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THE ANTITRUST REMEDIES IMPROVEMENT ACT AND THE INTELLECTUAL PROPERTY REFORM ACT OF 1987

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 1407

A BILL TO AMEND THE CLAYTON ACT REGARDING ANTITRUST ENFORCEMENT

AND

S. 635

SECTIONS 201-217 OF THE INTELLECTUAL PROPERTY REFORM ACT OF 1987

JUNE 30, 1987, AND MARCH 31, 1988

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S521-17

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HEARING ON S. 1407, THE ANTITRUST REMEDIES IMPROVEMENT ACT, AND SECTIONS 201-217 OF S. 635, THE INTELLECTUAL PROPERTY REFORM ACT OF 1987

TUESDAY, JUNE 30, 1987

U.S. Senate,
Subcommittee on Antitrust, Monopolies
and Business Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:37 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee), presiding.

Also present: Senators Thurmond and Specter.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. The subcommittee will come to order. I am sorry we had to start late, but I came in from out of the city, and my plane just did not get here until 10 o'clock.

Today the subcommittee begins the first in a series of hearings on two bills that amend the remedies provided by the antitrust laws.

One is S. 1407, a bill I introduced last week to provide greater relief to consumers, the Federal Government, and other victims of antitrust violations.

The other bill, S. 635, introduced by Senator Thurmond, contains amendments proposed by the administration.

Now, you might think that the agency responsible for enforcing the antitrust laws and protecting the American public would also try to tighten up the laws to help the American consumer. But you would be wrong.

Instead the Department of Justice is asking the Congress to make it harder for victims of price-fixing and other antitrust violations to be compensated. The administration's bill would overturn 70 years of antitrust laws by eliminating the treble damage remedy in most monopolization and resale price maintenance cases. The bill would also undercut the principle of joint and several liability for persons who engage in criminal price-fixing.

In contrast, my bill would give the Justice Department and the FTC authority to recover damages for victims of antitrust abuse. It would protect competition by strengthening the rules on divestiture. It would make the Justice Department accountable to the public when it dismisses an antitrust case or modifies a consent decree. And it would ensure the right of competitors to enjoin an illegal merger if they could prove competition was harmed.

The choice we face could not be clearer—should we rush to serve the interests of those who violate the law or is it our duty to protect their victims? For this Senator the answer could not be easier. As I have said many times, I will fight any bill that is anti-consumer and anti-small business. But let me make one point clear, the issue isn't just protecting consumers or small business—the overriding issue is the protection of the free enterprise system itself. This administration has put the free enterprise system in jeopardy by refusing to recognize—as the previous Republican administration have—that the antitrust laws are a necessary part of our free enterprise system.

I hope that as these hearings progress, my colleagues will join me in this fight to preserve the antitrust laws and to improve the protection they offer to the American people.

[Text of S. 1407 and excerpt from S. 635 follow:]

II

100TH CONGRESS
1ST SESSION

S. 1407

To amend the Clayton Act regarding antitrust enforcement.

IN THE SENATE OF THE UNITED STATES

JUNE 23, 1987

Mr. METZENBAUM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the Clayton Act regarding antitrust enforcement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Remedies Improvement Act of 1987".

REDRESS FOR CONSUMERS

SEC. 2. (a) Section 4C(a) of the Clayton Act (15 U.S.C. 15c(a)), is amended—

(1) in paragraph (1), by striking out "Any" and inserting in lieu thereof "The Attorney General, the Federal Trade Commission, or any";

(2) in paragraph (1), by striking out "such State," each place it appears and inserting in lieu thereof "the United States or such State, as appropriate,";

(3) in paragraph (2), by inserting "United States, or the" before "State";

(4) in paragraph (2), by striking out "including" and inserting in lieu thereof "and in the case of a State,"; and

(5) in paragraph (2), by adding at the end thereof the following: "The court, in its discretion, may order the distribution of the award in a manner that is just and equitable to those persons or the class of persons on whose behalf the action was brought.".

(b) Section 4C(b) of the Clayton Act (15 U.S.C. 15c(b)), is amended—

(1) in paragraph (1) by inserting "Attorney General, the Federal Trade Commission, or the" before "State";

(2) in paragraph (1) by inserting ", as appropriate," after "general"; and

(3) in paragraph (2) by striking out "State claim" and inserting in lieu thereof "claim of the United States or the State".

(c) Section 4C(d) of the Clayton Act (15 U.S.C. 15c(d)), is amended by inserting "Attorney General, the Federal Trade Commission, or the" before "State".

DAMAGES FOR INJURY TO THE UNITED STATES

SEC. 3. Section 4A of the Clayton Act (15 U.S.C. 15a), is amended by striking out "actual" and inserting in lieu thereof "threefold the".

DIVESTITURES

SEC. 4. The Clayton Act, is amended by adding between section 7A (15 U.S.C. 18a), and section 8 (15 U.S.C. 19), the following:

"CONSENT AGREEMENTS AND DECREES AND ORDERS IN ACQUISITIONS

"7B. (a) With respect to any acquisition—

"(1) no Commission consent agreement,

"(2) no consent decree proposed to a court of competent jurisdiction by the Commission or the Attorney General, and

"(3) no order issued by either the Commission or a court

which provides for the divestiture of any part of the assets of a party to such acquisition shall become final before the required divestiture has been approved by the Commission or the court. If the divestiture required by a consent agreement, consent decree, or order is not approved, such agreement, decree, or order may be rescinded by the Commission or court and the Commission or the Attorney General may petition the court for further relief or, if appropriate, initiate an action or proceeding to consider the legality of the acquisition and the need for further relief.

"(b) The provisions of consent decrees proposed by the Attorney General or the Commission and consent agreements proposed by the Commission shall be enforceable, consistent with the terms of the agreement or proposed decree, after agreement by the persons subject to the provisions of the consent decree or agreement, in accordance with procedures authorized by law for enforcement of final orders and decrees.

"(c) No divestiture shall be deemed an acceptable remedy for an acquisition which substantially lessens competition unless the divestiture fully restores competition lost as a result of the acquisition and there is a substantial likelihood that any buyer of divested assets will be a viable competitor for the foreseeable future. In approving divestitures, the Attorney General, the Federal Trade Commission, or the court, as appropriate, shall insure that reasonable steps are taken to protect the interests of affected employees and to preserve employment consistent with the full restoration of competition.".

INTERVENTION

SEC. 5. Section 5 of the Clayton Act (15 U.S.C. 16), is amended by adding at the end of subsection (f), the following: "Where any merger proposed by the Department of Justice or the Federal Trade Commission provides for divestiture of one or more enterprises or facilities which collectively employ more than 100 full-time employees in a State, the attorney general of such State shall be deemed to be an interested party and may intervene as of right in any proceeding under subsection (e).".

DISMISSALS, CONSENT DECREES AND MODIFICATIONS

SEC. 6. Section 5 of the Clayton Act (15 U.S.C. 16), is amended by redesignating subsection (i) as subsection (k) and by striking subsections (b) through (h) and inserting in lieu thereof the following:

"(b) Any civil proceeding brought by or on behalf of the United States under the antitrust laws may be terminated only upon order of the court before which such action is pending.

"(c) In civil proceedings brought by or on behalf of the United States under the antitrust laws, any motion for dismissal made by the United States or any proposal for entry of consent judgment submitted by the United States shall be filed with the district court before which such action is pending at least sixty days prior to the entry of an order of dismissal upon such motion or to the effective date of such consent judgment. Any written comments relating to such motion for dismissal or proposal for consent judgment and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such motion or proposal and any other materials and documents which the United States considered determinative in formulating such motion or proposal, shall also be made available to the public at the district court and in such other district as the court may subsequently direct. Simultaneously with the filing of such motion or proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) with respect to a motion for dismissal—

"(A) the nature and purpose of the proceeding;

"(B) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(C) an explanation of the motion for dismissal including the circumstances giving rise to such motion;

"(D) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such motion for dismissal is entered in such proceeding; and

"(E) a description and evaluation of the alternatives to such motion actually considered by the United States; and

"(2) with respect to a proposal for entry of consent judgment—

"(A) the nature and purpose of the proceeding;

"(B) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

"(C) an explanation of the proposal for a consent judgment, including an explanation of any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(D) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

"(E) a description of the procedures available for modification of such proposal; and

"(F) a description and evaluation of alternatives to such proposal considered by the United States.

"(d) Any proposal for modification of a judgment entered in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court in which such judgment was entered and shall be published by the United States in the Federal Register at least sixty days prior to the effective date of such modification. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

"(1) the nature and purpose of the proceeding;

"(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws and a description of the factors which led to the entry of the judgment to be modified;

"(3) an explanation of the proposal for modification including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

"(4) a description of the procedures available for modification of such proposal; and

"(5) a description and evaluation of alternatives to such proposal actually considered by the United States.

"(e) Whenever a motion for dismissal, a proposal for entry of consent judgment, or a proposal for modification of a judgment is filed, the United States shall also cause to be published in newspapers of general circulation in the district in which the motion or proposal is pending, in the District of Columbia, and in such other districts as the court may direct—

"(1) a summary of the terms of such motion for dismissal, proposal for entry of consent judgment or proposal for modification of judgment;

"(2) a summary of the competitive impact statement filed under subsection (c) or (d); and

"(3) a list of the materials and documents under subsection (c) or (d) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection. Such publication shall commence at least sixty days prior to the entry of an order of dismissal or prior to the effective date of the consent judgment or modification and shall be made for seven days over a period of two weeks.

"(f) During the sixty-day period as specified in subsection (c) or (d) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the motion for dismissal, proposal for consent judgment, or proposal for modification. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such sixty-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening, and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

"(g) Before entering any consent judgment proposed by the United States or any modification of a consent judgment proposed by the United States, the court shall determine that the entry of such judgment or modification is in the public interest. Before entering any order for dismissal, upon motion by the United States, the court shall determine whether or not such order is in the public interest. For the purpose of such determination, the court may consider—

"(1) the competitive impact of such dismissal, consent judgment or modification, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such result;

"(2) the impact of entry of such order, consent judgment or modification upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

"(h) In making its determination under subsection (g), the court may—

"(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

"(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group, or agency of Government with respect to any aspects of the proposed order, judgment, or modification, or the effect of such order, judgment, or modification, in such manner as the court deems appropriate;

"(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearances by amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest, as the court may deem appropriate;

"(4) review any comments, including any objections filed with the United States under subsection (f), concerning the proposed order, judgment, or modification and the responses of the United States to such comments and objections; and

"(5) take such other action in the public interest as the court may deem appropriate.

"(i) Not later than ten days following the date of the filing of any motion for dismissal, proposal for a consent judgment, or proposal for modification, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such motion, proposal, or modification except that any such communications made by counsel of record alone with only the Attorney General or the employees of the Department of Justice shall be excluded from the requirements of this subsection. Prior to the entry of any order of dismissal, consent judgment, or modification of judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

"(j) Proceedings before the district court under subsections (g) and (h) and the competitive impact statement filed under subsection (c) or (d), shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act, nor constitute a basis for the introduction of the consent judgment or the modification as prima facie evidence against such defendant in any such action or proceeding.".

PRIVATE ENFORCEMENT

SEC. 7. Section 16 of the Clayton Act (15 U.S.C. 26), is amended by inserting after "eight of this Act," the following: "and any person, firm, corporation, or association engaged in any line of commerce or in any activity affecting commerce shall have standing to sue any other person, firm, corporation, or association engaged in the same line of commerce or in the same activity affecting commerce to enjoin any acquisition prohibited by section 7 of this Act,".

○

Excerpt From S. 635

SECTIONS 201-217

TITLE II—ANTITRUST AMENDMENTS ACT OF 1987

SEC. 201. This title may be cited as the "Antitrust Amendments Act of 1987".

Subtitle A—Antitrust Equal Enforcement Act of 1987

SEC. 202. This subtitle may be cited as the "Antitrust Equal Enforcement Act of 1987".

CLAIM REDUCTION

SEC. 203. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 4H the following new section:

"SEC. 4I. (a)(1) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (1) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such actual damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.

"(2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination, or conspiracy among competitors, the court shall conclusively presume that any person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential liability if it has not been joined as a defendant and if it is established by the defendant that such person is legally and practically available as a party to the action to recover such damages.

"(b) For purposes of subsection (a):

"(1) Where the claim is based upon a price-fixing agreement among competitors and damages are sustained by reason of overcharges or underpayments resulting from such agreement, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments.

"(2) With respect to all other claims, damages shall be allocated on the basis of relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used in paragraph (b)(1).

"(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws, and nothing in this section shall affect whether or not an action may be maintained as a class action under rule 23(b) of the Federal Rules of Civil Procedure.".

EFFECTIVE DATE

SEC. 204. The provisions of this subtitle shall apply to all actions commenced under section 4, 4A, or 4C of the Clayton Act after the date of enactment of this Act.

Subtitle B—Antitrust Remedies Improvements Act of 1987

SEC. 211. This subtitle may be cited as the "Antitrust Remedies Improvements Act of 1987".

TREBLE DAMAGE REFORM

SEC. 212. Subsection (a) of section 4 of the Clayton Act (15 U.S.C. 15(a)) is amended to read as follows:

"(a) Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by him sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate such person for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee: *Provided*, That except as provided in subsection (b), damages sustained by reason of such person having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further*, That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the injured person promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

SEC. 213. Section 4A of the Clayton Act (15 U.S.C. 15a) is amended to read as follows:

"SEC. 4A. Whenever the United States is injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate the United States for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit: *Provided*, That damages sustained by reason of the United States having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further*, That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the United States promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

SEC. 214. Paragraph (a)(2) of section 4C of the Clayton Act (15 U.S.C. 15c(a)(2)) is amended by striking the second sentence and inserting in lieu thereof the following: "The court may award under this paragraph, pursuant to a motion by such State promptly made, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to compensate natural persons in such State for the injury sustained, on such total damage for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, if the court finds that the award of all or part of such interest is just in the circumstances.".

DEFENDANTS' ATTORNEYS' FEES

SEC. 215. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding after subsection (c) the following new subsection:

"(d) In any action under this section, the court shall award the cost of suit, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff's conduct was frivolous, unreasonable, without-foundation, or in bad faith.".

SEC. 216. Section 16 of the Clayton Act (15 U.S.C. 26) is amended by adding at the end thereof the following: "In any action under this section in which the defendant substantially prevails, the court shall award to such defendant the cost of suit, including a reasonable attorney's fee, upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.".

EFFECTIVE DATE

SEC. 217. The provisions of this subtitle shall apply to all actions commenced after the date of enactment of this Act.

Senator **Metzenbaum**. Our first witness is Charles G. Brown, West Virginia Attorney General, speaking on behalf of the National Association of Attorneys General, Charleston, WV.

It is nice to have you with us again, Mr. Brown.

There is a Democratic Conference at 12 o'clock, and we will follow a 5-minute rule for presentation of opening statements.

Mr. Brown?

STATEMENT OF CHARLES G. BROWN, WEST VIRGINIA ATTORNEY GENERAL, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, CHARLESTON, WV

Mr. **Brown**. Thank you very much, Chairman Metzenbaum.

Indeed it is an honor again to appear before you. Since I appeared last before you, I have become the chairman of the antitrust committee, succeeding Attorney General Abrams of New York, for the National Association of Attorneys General. General Abrams is now our president-elect.

I have written testimony, and I would like to submit that for the record.

Senator **Metzenbaum**. The statements of each of the witnesses will be included in the record in their entirety.

Mr. **Brown**. Thank you.

The Association of Attorneys General has a model bill to change the antitrust laws. That model bill represents the association's position on several issues which are before the committee today. So I can speak on behalf of the association on some of these proposals; on others, I will speak on my own behalf because the association would not have a position.

Senator Metzenbaum, you have tried to increase standing for private competitors on mergers. That is not a NAAG position, but I certainly support it. The 1986 Supreme Court decision which limited standing was unfortunate, because it is the private attorneys general who have the most impact on enforcing the antitrust laws, particularly now, when the Justice Department seems to be taking the position that they never saw a merger they did not like. We have to have more of a role for the private attorneys general; we have got to have competitors to have a chance to have the standing that we think they had, that historically they have had, in challenging mergers. So we certainly support what you are doing there.

I would also like to take this opportunity to commend the subcommittee on the concept of expanding parens patriae authority under section 4(c) of the Clayton Act to the Attorney General and the Federal Trade Commission. State attorneys general are principally responsible, however, for representing their citizens in antitrust cases and have fulfilled their obligations very well.

For example, coordinated State efforts on the *Minolta Camera* case are resulting this month and next month in rebates to thousands of consumers, indeed 1,200 consumers in West Virginia alone. Daily, we are conducting investigations of price-fixing. Minolta was a resale price maintenance case that if left to the Federal Government, the case never would have been brought. They do not believe in resale price maintenance, the Justice Department does not, so there never would have been a rebate to consumers at all.

I urge this subcommittee in its work in this area to include in the legislation some type of requirement that the Federal agencies contact the appropriate State attorney general before it undertakes any action on behalf of the people of that State. Only by requiring the confirmation that the State is not already acting in a given area can concurrent Federal/State authority be efficiently and effectively coordinated.

The State attorneys general, either individually or through the National Association of Attorneys General, would be happy to work with this subcommittee in drafting appropriate statutory language.

Finally, I would like to point out that while granting Federal agencies parens patriae authority is commendable, it is only a halfway measure. The most important thing this committee can do is overturn the Supreme Court decision in *Illinois Brick,* the 1977 decision, which knocked us out of bringing all kinds of lawsuits and bringing remedies to our citizens that they very badly need.

I would like to comment briefly on the administration bill by Senator Thurmond, who I am very pleased to be in front of today as well, Senator.

We commend the bill for bringing the Federal Government into getting treble damages; NAAG supports that.

We oppose the aspect of claims reduction because we think it would weaken private enforcement of the antitrust laws.

Also, NAAG opposes the limitation on treble damages, that is, not allowing treble damages in some types of damage actions.

Finally, we support the concept that there must be penalties for frivolous and bad-faith lawsuits brought by plaintiffs and that attorneys' fees and other sanctions ought to be imposed.

However, our resolution says it ought to be for "frivolous and bad faith"; we would not support going further to "unreasonable and without foundation." We think that is language that makes it too unclear and might deter cases being brought at all. So we support that concept, but we have a different choice of language in that area.

That concludes my testimony.

I am very pleased, Mr. Chairman, to see the Antitrust Subcommittee again examining important issues, whether it is in the insurance area, whether it is in the *Illinois Brick* area, whether it is in this area, to strengthen the antitrust enforcement, and I am very honored to again be before you.

Senator METZENBAUM. Thank you, Mr. Brown.

[Statement follows:]

STATEMENT OF CHARLES G. BROWN
ATTORNEY GENERAL OF WEST VIRGINIA

Good morning. Thank you, Mr. Chairman and committee members, for this opportunity to present testimony this morning before the committee. I have recently been selected as the Chairman of the Antitrust Committee of the National Association of Attorneys General and, as you may know, the Association has a model bill of changes to the antitrust laws. That model bill represents the Association's position on several issues which are before the committee today. Therefore, on the issues of treble damages and defendant's recovery of attorney fees, I speak for the bipartisan position adopted by the membership of the Association representing the attorneys general of the 50 states and various U.S. territories.

On other issues before the committee today, I speak not just as Attorney General of my state, but as a committed antitrust lawyer who has witnessed this Administration abdicate its enforcement of the antitrust laws of this nation. This committee well knows the record. Six and one-half years of the most lax enforcement of the antitrust laws since their inception. This administration has never met a merger it didn't like. Every merger is considered per se pro-competitive and efficiency enhancing.

We have not had a sound antitrust policy over the past six years nor will we see one in the balance of the present administration. The supposed policy of the Department of Justice is nothing more than the thinnest veneer rationalizing the abdication of meaningful enforcement and a green light to businesses to do what they please. I do not believe, and I do not expect the committee to believe, in the myth of the rational business manager acting solely from efficiency enhancing motives. And, anyway should efficiency enhancing motives provide a carte blanc to business? If so, then we might as well just tell the Department of Justice to drop all its defense contractor fraud cases. Those millions and millions of dollars were ripped off for the purest of business motives--profit maximization. If we follow the path of the administration, we follow it to the legitimization of business conduct no matter how seemingly anticompetitive. With the exception, I suppose, of bid rigging.

My remarks here are, more or less, preface to the concept of the private attorney general. Though the states have asserted new leadership and an increasing responsibility for preserving the antitrust laws, why should just the states and sometimes the federal government bear the sole burden of preserving the free market economy? I believe there is clearly a legitimate role for businesses--competitors, if you like--to self police the marketplace.

Is it not in the self-interest of competitors to ensure that their line of commerce is actively competitive with an absence of the growth of dominant firms arriving at that power by anticompetitive means? Why should the courthouse door be locked to those competitors? Especially, when the Department of Justice--previously the primary enforcer--stands not in the courtroom enforcing the laws but rather seems to have spent the past six years drinking coffee in the courthouse snack bar. I submit the antitrust laws cannot afford to weather another eight years like Reagan has and will continue to give us. We must ensure that enforcement tools are at hand for those ready, able and willing to use them.

Therefore, I commend the proposal of "The Antitrust Remedies Improvement Act of 1987" to secure for certain private parties the right of standing under § 16 of the Clayton Act to protect their legitimate competitive interests and the further benefit to the public which comes with the enforcement of our antitrust laws and the protection of competitiveness in the marketplace.

Of course, such proposal would not be necessary without the recent U.S. Supreme Court ruling in the Monfort case. In fact, the legislative histories of sections 7 and 16 bear out that this "new" law is actually only a burdensome reaffirmation, brought on by the Monfort majority's unfortunate analysis, of the Congress' original intent--to provide equitable protection for the small businessperson threatened by over-concentration in a particular market.

As Justice Stevens points out in his dissent in Monfort, it is inconceivable to believe that Congress intended, or would now intend, to deprive business competitors in a relevant market the right to at least achieve standing to challenge mergers which they perceive as damaging to competition in the future. These businesspeople are the central interested parties in such situations and must be allowed the chance to be heard when their experience triggers an alarm against a particular merger. Why must these potential victims have to wait for injury to their businesses to occur? And what truly adequate legal remedy can be provided to these victims after their businesses are irreparably damaged or destroyed? Section 16 was intended to provide relief for threatened injury, not actual injury as required by section 4 of the Clayton Act. Therefore, as Senator Metzenbaum proposes, the concept of "antitrust injury" must be affirmatively dismissed from the language of section 16.

To avoid nuisance litigation, the use of the section 16 equitable remedy by private individuals might be limited by a requirement that the harm to the businessperson be a "reasonable probability," given that the merger itself is harmful to competition. Yet, whatever the repairs necessary to maintain section 16 as an effective private enforcement mechanism, they must be made. I firmly believe that this injunction statute is an essential antitrust enforcement tool that must remain in the hands of our "private attorneys general."

Nor can we afford to strip those "private" attorneys general of the tools already in their possession. Here, I refer to the Administration's proposal to eliminate, in the majority of cases, the right to an award of treble damages. Our private attorneys general, in the absence of criminal sanctions and civil penalties, need a potent deterrent to effect the public purpose. To the extent that these private attorneys general aid the public purpose of law enforcement and the protection of the competitiveness of markets, they have shouldered a public duty and should have both sufficient inducements and reward to carry that burden. Treble damages serve that public purpose.

The Administration's proposal would do away with treble damages in the area where they are most needed--private antitrust suits that don't result in overcharges or underpayments. Under the current proposal, treble damages would still be available to a private plaintiff challenging a resale price maintenance scheme. However, many other types of anticompetitive arrangements, including those in the *per se* category such as tying arrangements, group boycotts and horizontal market allocation schemes, would be left without the treble damage remedy. In such cases the anticompetitive effects may be extremely harsh but are not in the form of overcharges or underpayments.

Likewise, in the vertical area, non-price rule of reason restraints such as customer or territorial allocation schemes often have seriously anticompetitive effects which are not in the form of overcharges or underpayments and the victim would be limited to single damages.

A remedy only comes into play after a plaintiff has proved its case. A plaintiff's antitrust case is difficult and onerous to prove whether under the "rule of reason" or *per se* standard. Detrebling of damages in this area would be the single most damaging change this Congress could enact. Lessening the penalty would make enforcement efforts more difficult by removing the major incentive for private enforcement.

There is no empirical evidence that the antitrust laws have had any appreciable effect on business decisions in the area of vertical restraints. Any deterrent effect that the law has in this area--which I believe is already de minimis--will be removed. Vertical or horizontal restraints that do not result in overcharges or underpayments restrain trade just as surely as price restraints. The treble damage remedy in this area should not be changed.

The question naturally arises as to the possibility of abusive litigation by these private attorneys general. I believe that problem is presently addressed by the significant price tag which attends complex antitrust litigation. However, NAAG supports the recovery of attorney fees for defendants where the litigation is frivolous or brought in bad faith. The proposal in "the Antitrust Amendments Act of 1987" keys to a standard of "unreasonableness" in awarding defendant's attorneys fees. The standard of unreasonableness is too vague and I believe would lend itself to claims for attorney's fee by defendants who have prevailed in litigation that was initiated in good faith and was not of a frivolous nature. We support the concept of defendant's award of attorney fees, but we believe that the standard should be one of "frivolousness or bad faith." We also believe that this would comport with Rule 11 protection, under the Federal Rules of Civil Procedure, presently afforded to litigants.

Senator **Metzenbaum**. Before we proceed forward, the distinguished ranking member of this committee has joined us.

I do not know whether or not you have an opening statement, Senator Thurmond.

Senator **Thurmond**. Mr. Chairman, I have an opening statement which I will just put in the record to save time.

Senator **Metzenbaum**. Thank you very much.

[Statement follows:]

Prepared Statement of Senator Strom Thurmond

Mr. Chairman, today the committee begins the first of what I understand will be several hearings on S. 1407, a bill by Sen. Metzenbaum; and the antitrust provisions of Title II of S. 635, which I have introduced—S. 635 contains three provisions which we will be considering today: claim reduction, treble damage reform, and attorney fees for defendants.

The claim reduction proposal is identical to S. 1300, which was reported favorably by the full committee last year. It remedies two serious problems that arise in private antitrust litigation: The "whipsaw settlement" effect and the abusive selection of defendants by plaintiffs.

The question of whether treble damages should be mandatory in antitrust suits—and if so, in which cases—has attracted a substantial amount of comment from antitrust scholars and practitioners, as well as from the business community. S. 635 provides treble damages for the victims of overcharges or underpayments, but actual damages for business rivals seeking to recover lost profits caused by an antitrust violation.

Finally, S. 635 provides for the recovery of attorney fees for substantially prevailing defendants after a finding by the court that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.

Mr. Chairman, I understand that there were several witnesses who were asked to appear and testify today, but were unable to attend because of previous commitments, including the Department of Justice and the Chairman of the Federal Trade Commission. I certainly hope that they will be among the witnesses we will hear from at the next hearing. In the meantime, I look forward to hearing from our witnesses today and thank them for their contributions to our deliberations.

Senator **Metzenbaum**. I would also like to say publicly that the witnesses this morning are all pretty much supportive of the position of the chairman of the committee. Our failure to have opposition witnesses was not intentional, and we have consulted with the ranking minority member and will make available opportunity for others to be heard. There were none who wanted to be heard at this particular time, but I did not want anybody to misread the Chair's intention to be fair and objective in bringing forth witnesses on the issue.

Mr. Brown, let me ask you, I agree with you that in giving the Federal Government paren patriae authority it is important not to undercut the authority that so many State attorneys general have used so effectively. One way to avoid this is to allow the State to opt out of any Federal suit and proceed with their own action.

Do you have specific suggestions for how you would prefer to have any opt out provision work?

Mr. **Brown**. I do not at this time, Mr. Chairman, but I would be very happy to have our staff at the National Association of Attorneys General—our counsel is here today—as well as myself work with you to see if we can come up with some language, because anything we can do to strengthen a coordinated effort among Justice, FTC and the States are programs that we definitely support.

Senator **Metzenbaum**. We would be happy to work with you.

Now, my bill, S. 1407, would guarantee a State attorney general the right to intervene in a consent decree proceeding for the purpose of addressing any divestiture that would affect over 100 employees. Do you think that the State attorneys general would find this provision useful?

Mr. BROWN. The National Association of Attorneys General does not have a position. I would certainly support that, and I would be inclined to think that the great majority of attorneys general would support it. It sounds like the type of program that, by dealing with disclosure, by dealing with strengthening enforcement and examining what the Justice Department is doing, that is the type of proposal that has consistently drawn the bipartisan support of the group.

And I might add, whenever I talk about the attorneys general supporting it, it means we have developed a consensus, a broad-based consensus, among our varied bipartisan and nonpartisan organizations.

Senator METZENBAUM. Would the State attorneys general support proposed changes to the Tunney Act that are made in S. 1407?

Mr. BROWN. I would be happy to bring that back to the State attorneys general. I personally support it, Senator. I like what you are doing in that area. And we can take that back to our group at our next meeting.

Senator METZENBAUM. What impact do you think the claims reduction provision of the administration's bill will have on the settlement of antitrust cases? In other words, will it make it harder for the State attorneys general to litigate price-fixing cases on behalf of consumers, and if so, how?

Mr. BROWN. Claims reduction is one where we have a position, and we are opposed to the administration proposal there. It would deter good faith settlements of cases. The claims reduction says that if someone has 20 percent of the market, then the claim is subtracted 20 percent when a settlement is made.

Now, in our joint and several liability concept, in our very developed Anglo-Saxon tort law, we have joint and several liability. We think it is a good concept. It has worked for hundreds of years. It seems to me to radically depart from the law of joint and several liability as it applies to intentional torts. There should be a tremendous burden on somebody to prove that we should depart from traditional tort law. I do not see any need for any departure. I think joint and several liability is a very good concept, and claims reduction is a major departure from the ordinary tort law of joint and several liability and indeed would reduce the chances for settlement, which is something that is generally favored in the law so we reduce the very time-consuming and expensive aspects of litigation.

Senator METZENBAUM. Thank you.

Any questions, Senator Thurmond?

Senator THURMOND. Thank you very much. We are glad to have you with us.

I have no questions, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Thank you very much, Mr. Brown. We appreciate your appearance as State attorney general, again appearing in connection with antitrust procedures.

Mr. BROWN. Thank you, Mr. Chairman, Senator Thurmond.

Senator METZENBAUM. Our next witnesses are Thomas K. Zaucha, president and chief executive officer, National Grocers Association of Reston, VA; and also, Harold Kohn, of Kohn, Savett, Klein & Graff, of Philadelphia. We are happy to have both of you with us.

Do you want to introduce the gentleman with you?

STATEMENT OF A PANEL, INCLUDING: THOMAS K. ZAUCHA, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL GROCERS ASSOCIATION, RESTON, VA, ACCOMPANIED BY RONALD BLOCH, CORPORATE GENERAL COUNSEL, McDERMOTT, WILL & EMERY; AND HAROLD E. KOHN, OF KOHN, SAVETT, KLEIN & GRAFF, PHILADELPHIA, PA

Mr. ZAUCHA. Yes, sir.

Good morning, Mr. Chairman, Senator Thurmond, and members of the staff of the subcommittee. My name is Tom Zaucha, and I am president of the National Grocers Association.

The NGA membership consists of some 2,000 retail grocers and food wholesalers who represent the small business sector of the food distribution industry.

I realize, Mr. Chairman, the immediate purpose for these hearings is the consideration of specific legislation to amend the Nation's antitrust laws. The proposed amendments are diverse in direction and complex in structure. In this regard, the National Grocers Association has submitted a detailed, section-by-section analysis of the proposals from our corporate counsel, Ron Bloch, of the firm McDermott, Will & Emery, who is here with me this morning.

We believe that such an evaluation is especially deserving of your consideration given Mr. Bloch's past experience as Assistant Director of the Bureau of Competition of the FTC until November of 1984.

We would ask that our complete statement be accepted for the record this morning.

Senator METZENBAUM. Without objection, so ordered.

Mr. ZAUCHA. What I would like to do is to spend 5 minutes with you this morning summarizing my opening statement.

The National Grocers Association has been recognized as the voice of small business in the food distribution industry. And this is a magic phrase: "small business." In recent years, no other facet of American economic life has received more praise. For example, small business has been responsible for virtually all of the new job creation in this decade. And we could go on and on.

Yes, indeed, there is an abundant supply of praise. But ironically, what is in very real short supply is adequate legislation and administrative support for the vital economic community. The record speaks for itself. With your customary bluntness, Mr. Chairman, you put it this way: "Let us start with a basic fact: This administration has a contempt for antitrust laws."

In the face of such circumstances, I would urge this subcommittee and the Congress to go back to basics, to return to some fundamental truths about the proper role of antitrust legislation in our national economic system.

The National Grocers Association strongly endorses the following three propositions here this morning.

First, the principle of "competition" must be subject to reasonable definition. It is vital that the circumstantial nature of each specific instance of competition is subject to evaluation and appropriate government policy.

To put this in a grammatical sense, the adjective is every bit as important as the noun. As a public policymaker, one does not confront individual instances of merely "competition." Rather, it may be good competition, or it can be bad competition, restricted or unrestricted, legitimate or illegitimate. The circumstances, the conditions, the manifestations of the competitive impulse must be considered and evaluated before any general judgment can be validly rendered.

Such a wholistic view of the proper role of competition in the economic process recognizes the desirability of its freedom, but only when properly balanced against its fairness and productivity to appropriate beneficiaries.

In short, our economic freedom must be bounded, controlled, and restricted by clearly articulated, carefully constructed standards which promote fair exercise of individual liberty.

In our economic world, this is the type of freedom small business seeks.

But secondly, Mr. Chairman, the grocers strongly support the proposition that the final, day-to-day operation of the Nation's antitrust laws is produced by dynamic interaction between both the administrative and legislative branches of government. For this to be true, there must be shared responsibility and information between both parties.

In recent years, the record of administrative agencies, such as the Federal Trade Commission and the Department of Justice, has been most discouraging.

To help correct this situation, NGA led the fight for passage of required FTC reports on predatory pricing investigatory activity. This law mandates scheduled, meaningful reporting of each individual FTC case decision to the appropriate arm of the Congress.

As Representative Don Edward of California recently put it, "It is not for Congress to conform the law to the administration's nonenforcement, but for the administration to conform its enforcement efforts to the law."

Such mandated information in our judgment plays a critical role in the oversight process, and NGA strongly supports a 3-year extension of these FTC reports as passed by the Senate in S. 677, the FTC Reauthorization Act.

Third and finally, Mr. Chairman——

Senator METZENBAUM. Can you sum up, please, Mr. Zaucha?

Mr. ZAUCHA. Yes, we are just getting to the third part.

New legislative initiatives must be carefully evaluated and considered in terms of their appropriate placement within the total philosophy of our Nation's antitrust statutes.

NGA believes that Congress, with your legislation, is now at a critical fork in the road. These two paths, which are reflected in the two bills now before your committee, address the critical role of potential private enforcement of the central purposes of our antitrust laws.

NGA contends that further weakening of these proposed possible penalties against anticompetitive practices now sanctioned by our laws, or the conditions under which they may be imposed, could seriously undermine the present already fragile balance of deterrence now in operation.

More specifically, we vigorously oppose section 212 of S. 635, the administration's proposal to eliminate treble damages in private antitrust cases, except for price-fixing.

Senator **Metzenbaum**. Mr. Zaucha, the things you are saying are things I would like to hear, because they are supportive. But if I am going to be fair to other witnesses, I cannot let you proceed further.

Mr. **Zaucha**. By all means. I want you to know, though, that we support the concept of treble damages and also, on the other hand, we vigorously support section 7 of 1407, legislation to overturn the *Monfort* case in order to maintain the rights of all concerned parties to legally challenge anticompetitive practices.

With that, we will conclude.

[Statement follows:]

PREPARED STATEMENT OF THOMAS K. ZAUCHA
ON BEHALF OF THE NATIONAL GROWERS ASSOCIATION

Mr. Chairman, and members of the Committee, I am Thomas K. Zaucha, President and Chief Executive Officer of the National Grocers Association (N.G.A.). N.G.A.'s membership consists of 2,000 retail grocers and food wholesalers who represent the small business sector of the food distribution industry.

I realize that the immediate purpose for these hearings is the consideration of specific legislation to amend the nation's antitrust laws. The proposed amendments are diverse in direction and complex in structure. In this regard N.G.A. has submitted a detailed section-by-section analysis of the proposals from our own Corporate General Counsel, Ronald Bloch of the firm McDermott, Will, & Emery. We believe that such an evaluation is especially deserving of your consideration given Mr. Bloch's past experience as Assistant Director of the Bureau of Competition of the Federal Trade Commission until November 1984.

Mr. Chairman, a fundamental principle of N.G.A.'s existence is based upon building a strong independent sector of the food distribution industry; one in which retail grocers working with their food wholesalers develop and provide a strong competitive alternative to their large, integrated, national competitors. Our philosophy is that retailers need strong, service-oriented wholesalers, and wholesalers need a strong competitive base of retailers, in order to survive in today's economic climate. N.G.A. has been recognized as the voice of small business in the food distribution industry. And there is the magic phrase "small business."

In recent years no other facet of American economic life has received more praise. Small business has been responsible for virtually all of the new job creation in this decade. Small business has retained and promoted the standards of service and quality, which the American consumer is increasingly appreciating when confronted with large national competitors. Small business invests in and is part of countless local communities throughout the nation. Small business is what has made this nation great. No greater example of small business' effectiveness exists than the local retail grocer or community multi-store operator.

Yes indeed, there is no shortage of praise. But ironically, what is in very real short supply is adequate legislative and administrative support for this vital community. The record speaks for itself. With his customary bluntness Senator Metzenbaum put it this way:

> "Let's start with a basic fact: this administration has a contempt for antitrust laws.
>
> "We've had a secretary of commerce flatly call for the elimination of the key portion of the law barring anticompetitive mergers; we've had an antitrust chief who openly derided leading U.S. Supreme Court antitrust decisions; we've had the "law and order" Justice Department and an anti-consumer Federal Trade Commission simply ignore those parts of the antitrust laws that don't conform to their arbitrary and untested economic theories.
>
> "An administration supposedly committed to free enterprise has encouraged an era of mega-mergers. It is no surprise that the largest sixteen mergers in U.S. history have occurred during the Reagan years.
>
> "Even big business realizes now that many of these deals have been

disasters for consumers, workers and shareholders, not to mention our international competitiveness."

In the face of such circumstances, I would urge the Congress to go "back to basics." To return to some fundamental truths about the proper role of antitrust legislation in our national economic system. N.G.A. strongly endorses the following propositions:

First, the principle of "competition" must be subject to reasonable definition. It is vital to recognize that the circumstantial nature of each specific instance of competition is subject to evaluation and appropriate government policy. To put this in a grammatical sense, the adjective is every bit as important as the noun. As a public policymaker one does not confront individual instances of merely "competition." Rather, it may be good competition or bad competition, restricted or unrestricted, legitimate or illegitimate. The circumstances, the conditions, the manifestations of the competitive impulse must be considered and evaluated before any general judgement can be validly rendered.

Yet the only such limitations too often appended today--if any at all--are those which deny limits, i.e. "free," "open," "unfettered." Such an inclination basically rejects the practical history of this century, as well as many of the fundamental purposes of government. For example, if free and unfettered competition were the only goal of government policy, then we should endorse those actors who engage in competition through false and misleading advertising; those business entities which find they can "compete" more effectively by paying less than the minimum wage and employing illegal labor, and those manufacturers which find a competitive "edge" in cutting corners with product quality and safety. That our society chooses to endorse none of those manifestations of competition is testimony to our conscious decision to promote competition by the rules. Rules which recognize that competition is good only when it ultimately benefits over time, the customer, the employee, and the nation as a whole. Such a wholistic view of the proper role of competition in the economic process recognizes the desirability if its freedom, but only when properly balanced against its fairness and productivity to appropriate beneficiaries.

In short, our economic "freedom" must be bounded, controlled, and restricted by clearly articulated, carefully constructed standards which promote fair exercise of individual liberty. This principle is not revolutionary or precedent shattering within our society. Again and again our nation's highest courts have held that our most treasured "freedoms," such as the freedom of speech, the freedom of travel, the freedom of religion, are not unlimited. Rather, their exercise is subject to careful restrictions designed to "promote the general welfare." In our economic world, this is the type of freedom small business seeks. Let me be very clear here. Small business does not need, and certainly is not asking for any special "favors," any "bending of the rules." We stand ready, willing, and able to compete against any other economic opponent. But that competition must not simply be "free." It must also be "fair," fair in the sense that clear and reasonable RULES govern its conduct. This is a principle which has guided Congress through the last century in the establishment of our antitrust laws. It has been a bipartisan principle which recognizes that consumers benefit when a number of competitors compete freely and fairly for the consumer dollar.

Second, N.G.A. strongly supports the proposition that the final day-to-day operation of the nation's antitrust laws is produced by dynamic interaction between both the administrative and legislative branches of government. For this to be true there must be shared responsibility and information between both parties. In recent years the record of administrative agencies, such as the Federal Trade Commission and the Department of Justice, has been most discouraging. Virtually no meaningful antitrust enforcement actions have been initiated or rigorously pressed. Far too frequently the "free" market threatens to become a "lawless" market.

We believe that a major reason for such developments has been the ongoing inability and/or unwillingness of Congress to hold the Administration's "feet to the fire" so to speak. Meaningful Congressional oversight has been hampered by the ability of agencies, such as the Federal Trade Commission, to conduct their affairs in a virtually explanation-free vacuum. Cases may not be initiated, or dismissed, or pressed with little vigor behind a facade of bureaucracy and confusion. To help correct this situation N.G.A. led the fight for passage of required F.T.C. reports on predatory pricing investigatory activity in H.J. Res. 738 (Public Law 99-591, October 30, 1986). This law mandates scheduled, meaningful reporting of each individual FTC case decision to the appropriate arm of the Congress. Its passage can provide the Congress with a powerful new tool of evaluation and control over administration inactivity.

Note that I said "can." N.G.A. urges that Congress fully use this tool to promote ongoing and active oversight.

As Representative Don Edward (D-CA) recently put it,

> "It is not for Congress to conform the law to the Administration's non-enforcement, but for the Administration to conform its enforcement efforts to the law."

Such mandated information plays a critical role in the oversight process and N.G.A. strongly supports a three-year extension of these F.T.C.

reports as passed by the Senate in S. 677, the F.T.C. Reauthorization Act of 1987.

Third, and finally, new legislative initiatives must be carefully evaluated and considered in terms of their appropriate placement within the total philosophy of our nation's antitrust statutes. N.G.A. believes that Congress is now at a critical fork in the road. Proposals are being advanced which could seriously cripple the entire foundation of our historic system of free and fair competition. Other statutory changes have also been advanced which could only strengthen that foundation. Which path you choose to travel could well determine the future of small business in the United States. I assure you that there is no dramatic "license" in that statement. Without active, interested Congressional involvement, small business will not confront the law of the marketplace, but rather the law of the jungle.

A very real illustration of these two paths and the directional choice which they pose can be found in the two bills now before your Committee. They both address the critical role of potential private enforcement of the central purposes of our antitrust laws. The F.T.C. or the Department of Justice may appear to be regrettably lax and lenient in their enforcement diligence. But potential corporate aggressors may still be deterred from anti-competitive conduct by the threat of harsh legal and economic consequences imposed by private plaintiffs through the judicial system. Any weakening of the possible penalties against anti-competitive practices now sanctioned by our laws, or the conditions under which they may be imposed, could seriously undermine the present already fragile balance of deterrence now in operation. More specifically, Section 212 of S. 635 represents the Administration's proposal to eliminate treble damages in private antitrust cases, except for price fixing. From a small business' perspective, treble damages serve as a real deterrent to potential antitrust violators. Reducing the potential penalty only makes future antitrust violations more "attractive" and thus more likely. As one retail grocer said,

> "It is like telling potential violators that there is a going out of business sale. Where before it would have cost $1.00, now it only costs $.33 if you get caught. The risk of engaging in anticompetitive behavior and cost of violating the law is now reduced 66 percent."

Indeed, the penalty would be limited to any benefits a predator had gained, so why not take the chance? What is there to lose?

On the other hand, Section 7 of S. 1407 offers to restore to private plaintiffs the opportunity to seek injunctive relief to mergers of their competitors. N.G.A. believes that it was Congress' intent to permit private business to challenge anticompetitive mergers which may substantially lessen competition. But the recent Supreme Court decision in Monfort has seriously impeded that right by creating artificial and unrealistic limitations upon private plaintiffs' standing to bring suit. If allowed to stand, these restrictions would gravely damage the entire system of private deterrence essential to our antitrust enforcement policy.

I realize that in your own deliberations careful analysis of each word, each phrase will be required. This is as it should be. But the National Grocers Association and all of small business urge the Congress not to let each individual, technical legal tree obscure the purpose and, yes, the beauty of the entire forest. The fundamental viability and desirability of the philosophical system of antitrust legislation must be strengthened by any action you take. That is the ultimate test you must pass.

PREPARED STATEMENT OF RONALD A. BLOCH

Corporate General Counsel, National Grocers Association

Historically, N.G.A. has publicly and consistently supported vigorous and fair enforcement of the nation's antitrust statutes. It's Board of Directors has recently reaffirmed that position as a matter of the Association's policy. It is against that background that we turn to the specific provisions of Senator Thurmond's proposals in Title II of S. 635 and to Chairman Metzenbaum's bill, S. 1407. N.G.A. generally opposes the former and supports the latter.

Title II of S. 635

Section 203 would add a new Section 4I to the Clayton Act. That section deals primarily with the apportionment of liability among antitrust co-defendants. N.G.A. takes no position on this provision.

N.G.A. vigorously opposes Section 212, which would substitute actual damages for treble damage recoveries in all private antitrust suits except those brought by victims of price fixing. The provision would also permit courts to award pre-judgment interest on actual damage awards.

N.G.A. believes that the threat of treble damages is one of the last remaining deterrants to violations of the antitrust laws. Government enforcement is at its lowest point in memory. Rather than strengthening antitrust, this provision would lower the cost of violating the law. In fact, the provision's only beneficiaries would be those who have violated the law. We believe that such a proposal is totally inconsistent with sound antitrust policy.

Section 212's only appealing feature is the prejudgment interest provision. Because of its additional deterrant benefit, N.G.A. would support its application to all money judgments under the antitrust laws.

Section 213 would permit the United States to recover treble damages in price-fixing actions brought on its own behalf. Prejudgment interest could be awarded as well. N.G.A. believes that this provision is appropriate, but that it does not go far enough. Optimally, Section 4A of the Clayton Act should permit the U.S. to recover treble damages and prejudgment interest in all actions in which it prevails. Similarly, in Section 214 of the bill, N.G.A. would prefer to see the award of pre-judgment interest in all cases in which a state is entitled to an antitrust money judgment. The dollars involved to the Treasury will probably have no significant effect on the federal deficit, but the cost to the violator could help deter unlawful conduct.

Sections 215 and 216 would require courts in all private suits to award costs and reasonable attorney fees to prevailing defendants upon finding that the plaintiff's suit was frivolous, unreasonable, without foundation, or in bad faith. These amendments immediately seem reasonable and worthy of support. However, closer inspection reveals flaws that require N.G.A. to oppose them.

First, the language of these sections appears to require, rather than permit, the award of costs and attorney fees. We believe the the trial courts should be given discretion to assess these amounts against plaintiffs. Their judicial hands should not be tied by preventing them from considering other relevant factors which might mitigate against the prevailing defendant. For example, a defendant that engaged in dilatory tactics would recover all of its costs; the language of the bill would not give the trial judge the discretion to deduct those unnecessary or unreasonable charges from the assessment against the plaintiff. The court's discretion should not be so limited.

Second, the bill does not define the defendant that "substantially prevails". In an action for money damages under Section 4 of the Clayton Act, suppose a plaintiff sues for $100 million in actual damages, but the jury returns a verdict for only $1 million. Did the defendant substantially prevail? Certainly, some clarification of the bill's vague standards are in order.

Third, we believe that these two sections of the bill may be unnecessary and that they could have an unwarranted chilling effect upon antitrust suits brought by small businesses. At present, the district courts, under Rule 11 of the Federal Rules of Civil Procedure, can impose sanctions similar to those required under Sections 215 and 216 of the bill. Rule 11 provides, in part, that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.G.A. believes that Rule 11 provides adequate protection to defendants who may be the subject of frivolous suits or suits brought in bad faith. It gives district courts adequate discretion to fashion relief appropriate to the circumstances of the case, and it covers a broader range of frivolous conduct than does the bill. Rule 11 also places a heavy burden on the plaintiff's attorney and therefore may be a much more effective remedy than Sections 215 and 216. The bill, on the other hand, could have the undesirable effect of discouraging the filing of meritorious cases, especially by small business plaintiffs.

In summary, N.G.A. believes that awards of costs and fees to plaintiffs should be balanced, limited, and necessary. "Balanced" in the sense that the courts ought to be free to reasonably determine both the actual flaws in the plaintiff's suit and the appropriate penalties, if any, to be awarded to defendants. "Limited" in the sense that terms such as "substantially prevails," which are subject to a wide range of interpretation, require refinement and clarification. "Necessary" in the sense that Congress ought not intervene when Rule 11 already provides appropriate and increasingly utilized relief.

The Antitrust Improvement Act of 1988 -- S. 1407

Section 2 would permit the F.T.C. and the U.S. Attorney General, in addition to state attorneys general, to sue in parens patriae to redress antitrust injuries to natural persons. N.G.A. believes that vesting this authority in the federal antitrust agencies will provide a needed additional deterrant to violations that are national in scope. Thought should be given, however, to giving express preemptive effect to any federal action on all state cases. This would make it clear that violations could not be pursued by both state and federal authorities.

As noted in our comments on Section 213 of S. 635, N.G.A. favors amending Section 4A of the Clayton Act to permit the U.S. to recover treble damages in all antitrust cases brought thereunder. Thus, we endorse Section 3 of this bill.

Section 4 of the bill would add a new Section 7B to the Clayton Act. It deals with procedural matters respecting the finality of government divestiture orders in Section 7 cases, the effect of consent orders and decrees once they are signed by the party charged, and the efficacy of the divestiture remedy. N.G.A. believes that these provisions will help to strengthen federal antitrust enforcement and that they should, therefore, be adopted. We offer a few clarifying suggestions.

1. Section 7B(a) would apply to orders that provide for divestiture of "any part of the assets" of a party. Although holdings of the voting stock of another corporation are clearly part of one's "assets", it might be helpful to make clear that the provision applies equally to orders requiring divestiture of stock as well as to assets.

2. Subsection 7B(c) appears to require the F.T.C. and the courts to determine with certainty that a divestiture will fully restore the competition lost as a result of the challenged acquisition. We believe that this could be a difficult burden of proof and that a "reasonable likelihood" standard should suffice. In addition, by focusing on "competition lost as a result of the acquisition," the provision could be interpreted to be inapplicable to acquisitions in which the acquired entity has been held separate by agreement with the government. We believe that the first sentence of Section 7B(c) should read:

> No divestiture shall be deemed an acceptable remedy for an acquisition that may substantially lessen competition within the meaning of Section 7 of this Act unless the approving court or the Federal Trade Commission finds that the divestiture is reasonably likely to fully restore or maintain competition in the affected markets, and that there is a substantial likelihood that any buyer of the divested assets or corporate entity will be a viable competitor therein for the foreseeable future.

Section 5 of the bill would amend Section 5 of the Clayton Act allowing state attorneys general to intervene in consent judgment proceedings in which there would be divestiture of facilities employing one hundred or more full-time workers. N.G.A. opposes this provision as well as with the last sentence of proposed Section 7B(c). That language requires the federal antitrust agencies "to protect the interest of affected employees" in all divestiture orders. The bill thus raises a legitimate policy issue: balancing the rights of employees who may be affected by a divestiture order with the public interest in maintaining competitive markets.

We do not believe that fundamental labor policy should be set forth in legislation dealing with antitrust remedies. These are separate issues that should be dealt with in separate legislation. Another concern with these proposals is their lack of guidance. The proposed statutory language provides no hint as to how Congress wishes to resolve the potential conflict between employment and competition policies. Consider the extreme example in which divestiture is necessary to restore competition, but it will inevitably result in substantial job losses. Are the antitrust agencies to proceed with divestiture, or yield to labor policy and allow the unlawful acquisition to stand?

This is an issue that is particularly ill-suited to resolution by antitrust enforcers and courts in the process of antitrust litigation. N.G.A. believes that labor policy considerations should not affect the use of antitrust remedies and hamper the enforcement of the antitrust laws. N.G.A. opposes the adoption of these provisions.

Section 6 of the bill would also amend Section 5 of the Clayton Act. The amendment would subject voluntary dismissals of government antitrust cases to the same public comment and competitive impact statement procedures that are now required for consent settlements. N.G.A. supports the general principle that the government should explain its actions publicly and permit interested parties to comment before those actions become final. We are concerned, however, that the application of that general principle to the government's voluntary dismissal of a pending antitrust suit may have the undesirable effect of creating a disincentive to bringing cases, thereby further reducing the number of enforcement actions.

There are many legitimate reasons for a plaintiff's voluntary dismissal of a suit, especially when it is without prejudice to the plaintiff's ability to re-institute the action. While there may be a belief that some actions are being dismissed for the wrong reasons, the bill makes no attempt to distinguish them from those in which dismissal is appropriate. N.G.A. believes that there is insufficient justification for subjecting appropriate dismissals to the same cumbersome procedure that is designed to protect the public against those that may be inappropriate. We believe that the long-range effect of this proposal could discourage new actions by an already lethargic Antitrust Division. Unless it can be convincingly demonstrated that the benefits of this amendment will outweigh its adverse consequences, N.G.A. would not favor its adoption.

We come, finally, to Section 7 of the bill, amending Section 16 of the Clayton Act to expressly permit private plaintiffs to seek injunctive relief preventing mergers of their competitors. This provision appears intended to overrule the Supreme Court's recent decision in the Monfort case. [*] N.G.A. has placed the reversal of this decision high on its list of legislative priorities. Section 7 of the bill has N.G.A.'s unqualified, wholehearted support.

In the Monfort case, the Supreme Court unceremoneously lowered the private attorney general into his grave. The district court and the circuit court both found the merger unlawful. But, because Monfort did not show that it would suffer a particular form of injury, the Supreme Court denied it standing to challenge the merger of two of its largest competitors. Therefore, the Court stated, "[W]e need not reach the question of whether the proposed merger violates §7." But, of course, one of the purposes of Section 16 of the Clayton Act is to permit private plaintiffs to test the legality of mergers. It was not intended as a device for predicting the precise form of injury that the private plaintiff will suffer. As Justice Stevens pointed out in his dissent, the appropriate question is whether "there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." That question can only be answered after the case has been tried on the merits. By concentrating initially on the nature of the plaintiff's potential injury, the Court creates a mechanism for avoiding the issue of a merger's legality and virtually eliminates private plaintiffs as effective adjuncts to government merger enforcement. Given the sad state of that enforcement, Section 7 will largely go unenforced. If the Monfort decision is not reversed by Congress, the competitive structure of the retail grocery industry could be substantially weakened through unlawful acquisitions without any antitrust challenge.

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[*] Cargill, Inc. v. Monfort of Colorado, Inc, ____ U.S. ____, 107 S. Ct. 484, 93 L.Ed. 2d 427 (1986).

This is especially true in light of the enforcement philosophy recently adopted by the federal antitrust agencies. The F.T.C. has not brought an enforcement action in grocery retailing since 1978.[*] The Antitrust Division has been notably absent from the grocery field for decades. Yet, under the Monfort case, an independent grocery retailer could do nothing to prevent the leading supermarket chain in his area from acquiring another major competitor and creating a competitive climate in which the small, efficient grocer cannot survive.

Our support of this legislation does not rest solely upon the government's current failure actively to enforce Section 7 of the Clayton Act in the grocery industry. Our position would be the same even if the F.T.C. were to bring a grocery merger case tomorrow. The grocery business is not the only one that has been affected by merger activity. All industries benefit competitively from actual and potential enforcement. In addition, the government does not have the resources to challenge every potentially anticompetitive merger. Section 16 provides the public with a necessary supplement to government enforcement by permitting private actions to bar anticompetitive acquisitions.

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[*] In the Matter of the Grand Union Co., et al., Docket No. 9121 (November 12, 1978). The Commission ultimately found no antitrust violation resulting from Grand Union's acquisition of Colonial Stores. See 3 CCH Trade Reg. Rep. ¶22,050 (1983).

Monfort creates an intolerable situation: the government may not enforce the law, and affected competitors cannot! Yet, by enacting Section 16 of the Clayton Act, Congress clearly intended the opposite result. Section 7 bars mergers that may substantially lessen competition; Section 16 was intended to permit those who would be adversely affected to enlist the aid of the courts to prevent unlawful mergers. The Monfort majority went out of its way to frustrate the clear intent of Congress. It converted the injury test that applies to actions under Section 4 into a standing test under Section 16. That is not only poor policy, it is irresponsible statutory construction.

The Court ignored the fact that a fundamental difference between these ~~two~~ provisions demands that different standards apply. Under Section 4, a plaintiff sues after the fact for actual injuries caused by the merger. It is not irrational to hold, even though the merger may be unlawful, that the plaintiff can recover damages for only those types of injuries that the antitrust laws were intended to prevent. [*] Thus, the Section 4 action is a two-step proceeding. The plaintiff must prove both that the merger was anticompetitive and that it has caused that plaintiff the kind of injury that Section 7 was designed to prevent.

This sort of test has no place in determining a plaintiff's standing in an action under Section 16, which must be brought before the merger occurs. Injury to the plaintiff, logically, can be no issue in such a proceeding. While the private plaintiff may be injured if the merger takes place, the focus of the action should be solely on the legality of the transaction under Section 7. If the merger may substantially lessen competition, it can be fairly presumed that the merger may also injure the competitor.

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[*] The Supreme Court so held in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S., 97 S. Ct. 690, 50 L.Ed. 2d 701 (1977).

There is no logical basis for different tests for a plaintiff's standing under Sections 4 and 16 of the Clayton Act If a plaintiff is a competitor in the product and geographic markets in which the legality of a merger must be judged, that alone should be sufficient to confer standing.

The bill would confer standing to sue to enjoin mergers on all competitors and would permit the parties to go directly to the Section 7 issues. N.G.A. believes that this is a desirable result. The Court in Monfort implicitly adopted the anti-enforcement argument of the "Chicago School", the notion that, if a competitor objects to a merger, it must be pro-competitive. That argument, like so many others of like origin, misses the point. If a merger is unlawful under Section 7, it is of little significance that a competitor brings the case; the result will turn on the legality of the transaction, not the motive of the plaintiff in bringing the suit. N.G.A. believes that the legislative overruling of Monfort is an antitrust policy imperative and supports its speedy adoption.

As this memorandum has indicated, N.G.A. supports revisions of the antitrust laws which will improve their efficiency and efficacy. However, we strongly resist any Congressional attempts to introduce legislative amendments which would weaken these statutes even further. Given the administrative practices and policies now confronted by small business, it is critical that the basic legislative integrity of the Clayton Act be vigorously maintained by the Congress.

Senator **Metzenbaum**. Mr. Zaucha, let me ask you a basic question.

Mr. **Zaucha**. Certainly.

Senator **Metzenbaum**. Is it fair to say—well, first, the National Grocers Association represents small business?

Mr. **Zaucha**. That is correct.

Senator **Metzenbaum**. And how many members?

Mr. **Zaucha**. We have 2,000 members.

Senator **Metzenbaum**. Mostly wholesale grocers, are they?

Mr. **Zaucha**. No; they are mostly independent grocers. We have 2,000 retail members and about 55 wholesale members.

Senator **Metzenbaum**. And as small businesspeople, you feel that strong and effective enforcement of the antitrust laws is good for the small businessperson?

Mr. **Zaucha**. By all means. We belong to what I consider to be a pretty darn competitive industry. We belong to an industry that is very careful by government standards. But when, in fact, the message coming out from Washington over these last 5 to 6 years, is kind of an "anything goes" mentality, well, then you can see that the system of reasonable standards no longer exists.

Senator **Metzenbaum**. And besides supporting effective enforcement, as a general policy you support stronger, more effective legislation and are opposed to weakening of the antitrust laws?

Mr. **Zaucha**. By all means, sir.

Senator **Metzenbaum**. Thank you.

Senator Thurmond?

Senator **Thurmond**. Thank you very much. We are glad to have you with us. No questions.

Mr. **Zaucha**. Thank you, sir.

Senator **Metzenbaum**. Thank you, Mr. Zaucha.

Mr. Kohn, we are very happy to have you with us this morning.

STATEMENT OF HAROLD E. KOHN

Mr. **Kohn**. Senator, it is always good to be back.

Senator **Metzenbaum**. We are happy to have you back.

Mr. **Kohn**. We have, of course, a written statement. Fairness requires me to say that Dianne Nast and Steve Asher of our office made no small contribution to the written statement. I would like to talk to you in plain English about what I think are the issues before you today. I am supporting your bill, Mr. Chairman. Most reluctantly, I find myself in opposition to Senator Thurmond's bill. As he knows, when he was chairman, I have consistently taken that position; it is very difficult to oppose anything the Senator wants, because he is so gracious. I remember he spent an hour or so with me dissecting I think the first of the ten or so contribution bills that have been introduced over a period of time.

Let me talk first about your bill, Senator Metzenbaum.

It seems to me to be a matter of common sense, and really, it ought not to be controversial, that the U.S. Government should not be a second-class citizen in its own house. This makes no sense, I think, to any sensible person that the United States should be deprived of the same right other people have with respect to treble damages when there is a violation of the antitrust law that adversely affects the United States. It is an improvement which is long overdue, and I really do not think it ought to be considered as controversial.

Secondly, I see no harm, and I think a good deal of good is achieved, by giving the Attorney General and the Federal Trade Commission the right to participate to recover damages. It really does no good to slap a large corporation on the wrist and send some minor executive down to the Elgin Air Base country club for a month. People have made millions or hundreds of millions out of antitrust violations, and they do not cough that up unless some private party brings suit against them. And once again, I think that makes no sense, and there is no reason why the Attorney General or the Federal Trade Commission when they are investigating violations, should not proceed to what really has some teeth—give back what you improperly took.

The third is the divestiture provision. It does seem to me that there should be some more effective judicial supervision of that.

The antitrust laws, do not forget, were enacted in the public interest. You frequently find, and generally among the more conservative judges who are not necessarily in love with the antitrust laws, that you must shown some injury to the public interest, to competition, as distinguished from your competitor. And it seems to me that in situations of this kind where you have divestiture, where you do have the public interest involved, that you ought to have a representative of the public having a right to come in and ascertain what is being done.

Remember Oliver Goldsmith's old poem—I go back to the days when they used to teach you something in school, before the days when they taught you only how to operate computers—and remember he said something about wealth accumulating and men decaying when they had the closure laws in England two or three hundred years ago. And when you have these divestitures, these mergers, you find that areas are adversely affected, human beings are adversely affected, and the net result is adverse. I think the common interest certainly ought to prevail against the takeover artists from Wall Street. And that is a way of achieving that.

Finally, with regard to vacating decrees, it seems to me that certainly at the very least there ought to be a statement as to what is different now. You all heard or read about Judge Green lambasting the Justice Department yesterday because of their change in position, and I think people sometimes forget why the decrees were put into effect. There should be a pretty broad and comprehensive explanation as to why they have to be changed.

With regard to the other bill, I have testified about this so much, I think I can testify in my sleep. I can give you nine different versions of my testimony in the past. I just think the Roundtable ought to give up. The U.S. Senate has a lot more important measures to take into consideration than to come back here every spring—it is like the weeds coming up in the springtime—

Senator **Metzenbaum**. They cannot help themselves. They keep going round and round.

Mr. **Kohn**. Yes. I did not see Mr. Milstein or Griffin Bell here today. I guess they will be in in due course. I have had my go-arounds with them. I mean, it is almost like sparring.

Every one of these measures has been considered before, and every one was rejected by a Republican Senate. I think with the deficit and all the other things you have got to consider, they ought to voluntarily withdraw.

We have, of course, set forth in great detail in our written statement the reasons which we have argued before which oppose, really, every one of these things.

I notice the red light on, but one thing I do want to say is what I think the Senate, this committee, ought to be doing is asking the gentlemen from the Justice Department to come up here a couple of times a year and tell you what they are doing and why they are not doing what they ought to be doing. And it might be a good idea to have some of the people heading the district offices who have a somewhat greater devotion and a continuous devotion to the effective enforcement of the antitrust laws, as distinguished from the peole who sometimes are in charge in Washington. I think you really ought to give consideration to that as one of the measures which would make for effective enforcement.

Senator METZENBAUM. Do you mean to have the leadership come up, or are you talking about the regional offices coming in?

Mr. KOHN. I think both—I think the regional offices, to tell you what they would like to do; and the Attorney General or the Assistant Attorney General, to tell you why they are not doing it.

Senator METZENBAUM. You know that all testimony before congressional committees has to be cleared. And I am afraid that we would not achieve that much under those circumstances.

Mr. KOHN. Well, that might be effective, too. It is like pleading the fifth amendment. It might give you some idea what is really on their minds.

Senator METZENBAUM. Let me ask you a question. You have talked so much about this joint and several liability issue. You have litigated many antitrust cases. How many times have you seen the defendant pay damages that were wildly disproportionate to its market share?

Mr. KOHN. Almost never, almost never. It has worked well. I mean, it is one of those things that does not need fixing. Really, Senator, nobody has any legitimate complaint about the way that has worked. It has enabled people to exercise great flexibility. The defendants can work things out among themselves as they always do, and there is just no need for this tampering.

Senator METZENBAUM. We get this argument that somebody has 1 percent of the market share and is called upon to pay 70 percent of the total damages. What about that?

Mr. KOHN. I see the distinguished Senator who represents me, from the State of Pennsylvania. I have argued that before him in prior sessions, and we went through chapter and verse on examples and so on. And with all the resources they have, they have not been able to dredge up one real instance of anybody who has been adversely affected by that. And I really mean that.

Senator METZENBAUM. How would you feel about a provision which would allow the judge to permit a defendant to seek contribution from his coconspirators in exceptional cases. In other words, one defendant has a small market share and played no active role in the conspiracy, but it asks for most of the damages. Would there be any merit to giving the judge some leeway?

Mr. **Kohn**. I think there would be no merit. I think it is unworkable. I think every judge in the United States who has had any experience with antitrust cases would oppose it. Instead of antitrust litigation lasting for 10 years, it would last for 20 years. There has to be a finality to something. And it has worked well. There has been no need for this sort of thing.

This is not a proposal to improve the administration of the antitrust laws. It is a proposal for the purpose of making it impossible to enforce the antitrust laws. That has been evidenced throughout the years that this kind of bill has been introduced.

Senator **Metzenbaum**. Thank you.

Senator Thurmond?

Senator **Thurmond**. Thank you very much.

Mr. Kohn, we are glad to have you with us.

Mr. **Kohn**. It is always a pleasure to be with you, Senator.

Senator **Thurmond**. You have been here many times, and you are an excellent lawyer. Of course, I understand your viewpoint.

You note correctly that S. 635 would reduce damage awards by the amount that an unnamed coconspirator is responsible for the underpayment or overpayment, and you cite as an example a 50 percent reduction in damages.

What reasons would a plaintiff have for not suing such a coconspirator?

Mr. **Kohn**. Well, many times, you do not want to sue some poor, small manufacturer, for example, for a variety of reasons. One, the jury may be sympathetic to him as a practical reason. Second, he may not be worth suing because he does not have any money, and if you get a judgment, you will put him out of business. This gives you the flexibility to help the small person. It does not prevent you from doing it; it helps you to do it. And that is why you would not want to sue him.

You get into the esoteric determination of what market shares are, and you will be there forever. The defendants themselves cannot agree, frequently, on what their market shares are when they try to work out these sharing agreements. They do not trust each other; they are not candid with each other, and we would have two or three additional lawsuits, one of which is to determine market shares, which really is of no relevance. You can do that much better by using your own overall commonsense judgment than you can when you have to get in and make a judicial determination of that fact.

Senator **Thurmond**. Mr. Kohn, you quote extensively in your written statement from Mr. Rule's testimony before this committee in 1985 relating to S. 1300. Are you aware that the opposition he was expressing to S. 1300 focused entirely on the elimination of joint and several liability?

Mr. **Kohn**. I think so. But I think it is the attitude toward the overall problems of the administration and enforcement and amendment of the antitrust laws that are important. These are just facets which illustrate, I think, a common attitude toward the problem. They are specific illustrations of a more general principle.

And I think it is appropriate, just as Mr. Shenenfield's remarks are appropriate.

Senator **Thurmond**. Are you also aware that S. 1300 in its final form did not eliminate joint and several liability?

Mr. **Kohn**. I have forgotton now whether it eliminated or whether it affected it.

The whole purpose of the contribution, the claim reductions, the joint and several liability and so on, is to make it difficult to administer antitrust laws, to make it difficult to give you the flexibility and settlement which enables these matters to be disposed of without prolonged trials. And they all have a common end; they come from a common source, my two very good friends, whom I mentioned before, and I am sure that when they testify, as they undoubtedly will again, you will detect the common thread and the common purpose in all of these measures.

Let me tell you, when my father was in business, there was a salesman of whom they used to say if you threw him out the front door because he was bothering you, he would come in the back window. He was a good salesman.

These fellows are good salesmen. They have been thrown out with 19 different versions, and they are back now with the 20th, and I assume that they will continue to come back when you and I are no longer here to continue the testimony.

Senator **Metzenbaum**. I wonder if the ranking minority member would mind yielding to Senator Specter, because we are under some time constraints.

Senator **Thurmond**. Yes, I will be glad to yield.

Senator **Metzenbaum**. Thank you very much.

Senator Specter?

Senator **Specter**. That is all right, Senator Thurmond. If you have more questions——

Senator **Metzenbaum**. Well, we have got a rollcall on, you know, so I was just trying to see if you could take 3 or 4 minutes, and I did not think my colleague would mind.

Senator **Specter**. All right. Mr. Kohn, let me join in welcoming you here, and note briefly our long association and my great respect for your experience and wisdom in the antitrust field.

I think you put your finger on a key factor when you talk about flexibility in settlements, and with the possibility of a defendant among many being responsible for a significant verdict, that does have forceful factor in inducing a settlement. And I suppose the essential question is whether that is fair in the overall litigation process.

You point out that there is no substantiation of the proposition that somebody with a very small market share has ever been hit with a verdict which is disproportionate.

Are you equally confident that no one with a small market share has ever been called upon or agreed to pay a disproportionate settlement in such a case?

Mr. **Kohn**. Basically, I would say that there has been no disproportionate or untoward aspect. I really mean it. You had some experience yourself, when we were on opposite sides of litigation of this kind. And basically, I think it has worked out well with that flexibility.

I think to arbitrarily require that market share be a determination and not take into account the other ameliorative facts, such as the size of the company and so on—you may have a tremendously large company which has a very small market share and a very small company which has a very large market share.

As Dianne Nast pointed out as we were coming in on the train this morning, there are situations where there are codefendants, as for example in the *Water Heater* case in Philadelphia in the Eastern District of Pennsylvania, where one of the conspirators, a major architect of the conspirator, had no market share. It did not even manufacture the product; it manufactured a component that went into the product. In order to enhance its position with the manufacturers of the product, it made itself sort of the instigator or majordomo of their conspiracy, provided the facilities for the meetings. That is another aberration.

You remember, Senator, one of the problems is drafting legislation which achieves the purpose of the drafters. Again and again, the proponents in the Senate were unable to come up with legislation which really covered what they intended to cover. And this legislation—I think this is extremely important—has the same drafting defect problems in it.

Senator SPECTER. Several years ago, I believe it was in 1982, we had a considerable controversy about legislation which would apply in a retroactive sense a reduction in verdicts. There was major litigation. You testified at that time.

Mr. KOHN. Plywood and Corrugated.

Senator SPECTER. And I think there was consideration at that juncture to perhaps some modification which would be prospective only.

Mr. KOHN. That is right.

Senator SPECTER. Would the thought that we had at that time be anything more than a way out of that controversy? Would that have any applicability to the present problem?

Mr. KOHN. Well, without being unduly facetious, I think at that time, with that Senate, there was a possibility that something might have been enacted. I think it illustrates what I would say is a lack of good judgement and the overreaching of my opponents. They refused to make a compromise at that time to get what they might have gotten—a compromise which I would have thought was not in the public interest.

Senator SPECTER. That was really a heated matter. I think that——

Mr. KOHN. That is why you opposed the legislation back then.

Senator SPECTER. But the activism—not to use the word "lobbying"—was more intense on that issue than I think at any time, back in 1982. And former attorneys general and judges were seeking appointments and standing outside of our offices, timing how long the previous appointment was. And there had been some suggestion of a compromise which would have encompassed some of what we are discussing today.

Mr. KOHN. I think Senator Heflin said he had no time for budget, he had no time for foreign affairs; he had no time except to speak to people who were trying to get rid of treble damages.

Senator SPECTER. Well, it is a vexing issue, and it has been with us a long time.

Mr. Chairman, I thank you for the opportunity to question out-of-turn.

[Statement follows:]

TESTIMONY OF HAROLD E. KOHN
BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST MONOPOLIES AND BUSINESS RIGHTS
UNITED STATES SENATE

JUNE 30, 1987

RE: S.635 and the Antitrust Remedies Improvements Act submitted by Senator Howard M. Metzenbaum

I.

On several occasions in recent years, I have testified before the Senate Judiciary Committee (or its Subcommittee on Antitrust, Monopoly and Business Rights), and comparable Committees in the House, with regard to legislative proposals for contribution and curtailing joint and several liability among Defendants in price-fixing cases. Like a number of other experienced antitrust lawyers, I opposed those Bills, and no such Bill was enacted into law.

The current Bill, S.635, suffers from many of the same infirmities as the prior proposals, as well as some new ones. Accordingly, my conclusion as to S.635 is identical with my views with respect to the prior bills.

The proposed legislation is unnecessary, it will create rather than resolve problems, and it is opposed to the public interest in a competitive and efficient economic system and an effective system of judicial administration.

II.

I am the senior member of the firm of Kohn, Savett, Klein & Graf, P.C., 2400 One Reading Center, 1101 Market Street, Philadelphia, Pennsylvania. I was admitted to practice in 1938, and, for the last 30 years or more, I have had extensive antitrust practice, representing both Plaintiffs and Defendants, including major Defendants, in antitrust cases. By designation of courts throughout the country in more than a dozen cases, I have been lead counsel or co-lead counsel for Plaintiffs in class action antitrust litigation.

I was among the lead counsel for Plaintiffs in the Electrical Equipment antitrust cases in the early 1960's, representing the Philadelphia Electric Company, the Government of India, scores of Rural Electrification Administration Cooperatives, and municipal and other claimants. I successfully tried the first of four such cases to go to trial, leading to the settlement of thousands of others.

I have participated in panel discussions sponsored by the American Bar Association, most recently at the ABA meeting in New York, various state and local Bar Associations, the Judicial Conference of the Third Circuit, the Practicing Law Institute, and other groups.

I was Chief Trial Counsel in the Plywood class suit litigation in which the jury returned a substantial verdict against non-settling Defendants. Payments in the amount of approximately $200 million are now going to class members.

III.

Section 203 of the proposed legislation provides, in essence, that any time a Plaintiff does not name a co-conspirator in a price-fixing scheme as a Defendant, the damages finally awarded in the action will be reduced by the unnamed co-conspirator's proportionate share of underpayments or overcharges, so long as a named Defendant can prove that the unnamed co-conspirator was available as a party.

For example, suppose damages are awarded by a jury in the amount of $1 million. Suppose an unnamed co-conspirator is responsible for 50% of the underpayment or overcharge. Damages are reduced to $500,000.

The statute presents difficult post-trial proof problems. How, for example, will it be determined what any conspirator's proportionate share of overcharges was? This is not necessarily the same as market share. Who will have the burden of proof -- Plaintiff, Defendant, unnamed co-conspirator?

As to non-price-fixing claims, again damages are to be reduced, allocated on the basis of "relative responsibility" for the violation. This, I take it, is akin to the comparative fault concept in negligence law. Again, the post-trial proof problems add a whole additional layer onto every antitrust case.

This section goes on to state that it shall not eliminate joint and several liability. What this must mean is that after damages have been reduced, as illustrated above, then the named Defendants are all each still jointly and severally liable, but only for whatever damages are left. Thus, although joint and several liability remain, the amount subject to such liability is reduced.

Finally, the section provides that it shall have no effect on whether an action can be maintained as a class action. In other words, one may still sue one conspirator, on behalf of persons who purchased from other conspirators. Procedurally, with respect to Rule 23 of the Federal Rules of Civil Procedure, there is no change, but when damages are ultimately awarded, they will be drastically reduced as illustrated above.

A difficult issue which will inevitably arise under the proposed legislation is whether an unnamed entity is in fact a co-conspirator. Every named Defendant will have an interest in accusing other unnamed entities of also being at fault, since this will reduce the Defendant's own damages. Presumably, this would have to occur post-trial (since during trial, the Defendant will be maintaining its innocence).

IV.

As stated earlier, I oppose the proposed legislation, the policy reasons for my views, summarized briefly, are as follow: —

(1) While the Bill purports to have no effect on joint and several liability, in reality it has such an effect, since it reduces the amount of the judgment subject to such liability. To this day, despite all the proposals designed to destroy joint and several liability, no one has yet demonstrated that any such Bill is necessary. The antitrust laws have functioned for nearly a century with joint and several liability. No company has thereby been destroyed or bankrupted. No Defendant which has approached litigation in a practical, businesslike and sensible manner has been unjustly or harshly penalized. Literally hundreds of major corporations in the United States have been able to cope with the problem of restitution for antitrust violations under the present laws.

(2) Indeed, Defendants always have the right of self-help to dispose of any potential problem of allocating damages, by executing "sharing agreements", which allocate damages among them, as they see fit, tailored to the specific needs of their litigation, without interference from Plaintiffs, Court or Congress.

(3) It is worth noting that when The Honorable Griffin Bell, one of the chief proponents of the legislation, was Attorney General of the United States, he authorized a representative of the Department of Justice to testify in opposition to a Bill similar to the one now espoused, and that representative expressed substantial misgivings about the legislation. John Shenenfield, Esquire, the Assistant Attorney General of the Antitrust Division, testifying on behalf of the Department of Justice, on Friday, June 8, 1979, before the Subcommittee on Antitrust, Monopoly and Business Rights testified that in his experience, there was no problem with respect to the rights of small Defendants, which is of course the group of businesses S. 635 is purportedly designed to protect. Mr. Shenenfield said:

> "One of the questions that has occurred to me in examining this issue from my own experience in antitrust law is just how severe the problem sought to be remedied here really is. We have discussed this issue with some members of the antitrust bar, and we find a little bit of the same kind of puzzlement.
>
> "For instance, how often do antitrust defendants, particularly small defendants, who may not have been particularly culpable, get left holding the bag? How frequently are small defendants coerced by plaintiffs into forgoing a legitimate claim of innocence?
>
> "I was surprised in thinking this over. In my Antitrust Review Commission experience, I don't recall anybody mentioning this as a problem I am subject to correction on that, because it may have been in one of the submissions I never saw, but it is clear, at least that it wasn't at the top of the list of problems that needed to be remedied on behalf of the people who approached us. While that isn't a good reason for failing to proceed, I grant you, it does give me some pause in my consideration of how severe the problem may be.

> "All of us in that room who are interested in strong antitrust enforcement share this concern: We wish to be quite confident that we are not giving up more in the way of antitrust enforcement than we are protecting in the way of fairness to all the parties."

*Testimony of John Shenenfield, Assistant Attorney General, Antitrust Division, Department of Justice, on Antitrust Equal Enforcement Act of 1979, S.1468, June 8, 1979, Serial No. 96-27, pp. 4-32.

Later in Mr. Shenenfield's testimony, he explained why contribution should not be applicable to price-fixing cases:

> ". . . One begins, if you want to examine each of those questions a little bit, first with the question of what type of antitrust violation you wish to have addressed. This proposal addressed price fixing. Some of my staff did a little research into the history of contribution and found it is most frequently used in cases of unintentional torts. The English common law confined it to unintentional torts and did not permit it in cases involving intentional torts. American judges, historically have not made this distinction as clearly. The general rule today, at least if you look to the restatement of torts, in this country still denies contribution among intentional tortfeasors, although it is clear that some judges have permitted contribution among intentional tortfeasors, and many States also permit it.
>
> "Intent in the antitrust context, and certainly in the civil antitrust context, is not as crucial an ingredient as it is in tort litigation. There may be other ways to make a similar distinction in antitrust cases if this difference between intentional and unintentional torts is crucial because of the deterrence issue. You would want to deter intentional conduct, but you also might want to spread the risk if conduct is truly unintentional. There may be ways to grasp that kind of distinction in the antitrust area that would be just as helpful.
>
> "For instance, instead of applying contribution to all antitrust violations, you might wish to confine it to rule of reason violations, to allow it

> only for noncriminal violations, or perhaps allow it for only particular categories of violations, the reason being that contribution has commended itself to judges as a means of spreading risk without affecting deterrence where you are dealing with unintentional torts. However, the analogy of that would be rule of reason cases in the antitrust field rather than the per se variety of cases. . . ." (emphasis supplied).

*Testimony of John Shenenfield, Assistant Attorney General, Antitrust Division, Department of Justice, on Antitrust Equal Enforcement Act of 1979, S.1468, June 8, 1979, Serial No. 96-27, pp. 4-32.

While that testimony technically referred to contribution proposals, the same arguments apply with equal force to S.635 which is intended to achieve the same result by drastically reducing joint and several liability, by eliminating from the judgment subject to joint and several liability damages attributable to unnamed co-conspirators.

(4) The proposed legislation is a substantial deterrent to settlement, and of course, without settlement, litigation cannot proceed in an expeditious manner.

(5) The opposition of the Reagan administration to the prior contribution proposals is worth noting, particularly since this administration is generally considered to be a friend of big business. The administration, through the Attorney-General's office, last year opposed S.1300, saying that there is no particular benefit to society from being fair to antitrust felons. As reported in the Antitrust & Trade Regulation Reporter, Assistant Attorney general Charles F. Rule, testifying before the Senate Judiciary Committee, said that the Bill "would effectively insulate such defendants from the concerns of having to pay more than treble the damages directly attributable to their own sales". Rule also said that those antitrust defendants in

need of fairness - those who engage in "procompetitive or competitively ambiguous conduct - would seldom be able to invoke S.1300." Elimination of joint and several liability, he predicted, "likely would reduce deterrence." S.1300 would apply primarily to horizontal price fixing, which "is always anti-competitive." This type of adverse effect on deterrence, he added, would be "highly undesirable." The Antitrust Division's position, Rule said, is that "this undesirable effect of S.1300 clearly outweighs the arguably beneficial effect of reducing individual defendants' damage exposure - a benefit that would, in any event, principally accrue to culpable individuals who had intentionally participated in criminal conspiracies."

The Bill, according to Rule, "would reduce plaintiffs' incentives to invest in detection and to bring suit" in three ways: (1) higher litigation costs through suing all members of a conspiracy, proving damages against each member of the conspiracy, and collecting damages from all firms liable under the judgment; (2) open questions on financial incapacity, efforts to secure a defendant's appearance or prove lack of jurisdiction, and the extent of liability of the remaining defendants for that share of damages; and (3) preclusion of recovering damages under an umbrella theory.

Rule also said that another component of deterrence - "the risk of being found guilty" - may or may not be affected by the bill. A third component of deterrence - "a prospective conspirator's estimation of the magnitude of its potential liability if it were sued and found guilty - would likely decrease if joint and several liability is eliminated." The expected cost of private liability to a price fixer, in all likelihood, "will be lower under S.1300 than it would have if liability were joint and several," Rule said.

Furthermore, according to Rule, in bid rigging cases, co-conspirators who refrain from bidding or who submit "complementary" bids would be liable for no damages because they have no sales subject to the conspiracy, Mr. Rule's arguments on behalf of the Administration apply with equal force to S.635.

(6) The Bill also apparently would eliminate treble damages in non-price fixing cases. Given the difficulties of proof on such cases, and the increasingly difficult legal standards being established by the courts, it is unwise for Congress to create additional disincentives to suit. Treble damages should remain in these cases as a deterrent and as an encouragement to private enforcement of the antitrust laws.

(7) As a practical matter, the Bill is unworkable, some of the problems with the pending bill were noted by the Supreme Court in the opinion of Texas Industries, Inc. v. Radcliff Materials, 451 U.S. 630 (1981), in which the Chief Justice of the United States listed some of the problems of allocating or apportioning liability. These difficulties must be carefully considered if any legislation is to be rational. As the Supreme Court observed in Texas Industries, attempts to divide or apportion damages among groups of co-conspirators create difficult problems. This is because the participation of each co-conspirator in the conspiracy may have varied. Some conspirators may have caused greater damage to their customers than other conspirators did. Some may have profited more than others. Some may have been merely followers, others leaders. In the words of the Court: "One may be a 'giant', others 'pygmies'." 451 U.S. at 637. The Supreme Court, while

observing that damages could be allocated according to market share, concluded that no matter what rule was adopted for allocating damages, the complexity of the problems thus created might in itself result in additional trial, pretrial or post-trial proceedings, thus adding further complexity to what is already very complex.

In addition to the apportionment problems created by the pending Bill, there are other problems, alluded to earlier. At some point in the litigation, it will have to be established who the unnamed co-conspirators are. When in the proceedings will this occur, and who will have the burden of proof? Will Plaintiff be entitled to discovery from non-parties? Will this be a jury or non-jury proceeding? What *res judicata* effects will the findings with respect to unnamed co-conspirators have on Plaintiff's right to subsequently sue such entities?

There is maxim, "For every solution, there is a problem." That is precisely what the effect of this legislation will be, for in an attempt to solve problems which do not really exist, real problems will be created. Thus, as a matter of policy, the Bill is bad law.

In conclusion, I submit that the old adage, "If it ain't broke, don't fix it" should be applied here. There should be no legislation enacted unless there is a need for it. Price-fixing cases under Rule 23 have been filed and resolved for over 15 years. There is no instance where any small businessman has been put out of business because of a price-fixing case.

Accordingly, your Committee is most respectfully requested to vote its disapproval of the proposed legislation. It is opposed to the public interest.

TESTIMONY OF HAROLD E. KOHN, ESQUIRE
BEFORE THE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
UNITED STATES SENATE

June 30, 1987

The Antitrust Improvement Act of 1987 ("AIA") proposes a number of salutary amendments to the Antitrust Laws of the United States. I would like to briefly describe these proposals and explain why, in my opinion, they should be enacted.

A. Redress For Consumers

The first aspect of the AIA amends Section 4C(a) of the Clayton Act (15 U.S.C. 15c(a)). That section currently provides a parens patriae remedy wherein a state attorney general can bring an action on behalf of the citizens of his state who are injured by virtue of a violation of the Sherman Act. The proposed amendment would permit such an action also to be brought by the United States through either the Attorney General or the FTC on behalf of citizens in any state injured by a violation of the Sherman Act. In addition, the amendment permits distribution of the award to the persons or the class on behalf of whom the action was brought.

Both of these developments are desirable. The Clayton Act currently permits a parens patriae action on behalf of the citizens of a state by its attorney general, but does not permit such an action to be brought by the United States on behalf of its citizens. While antitrust violations have effects which lend themselves to statewide remedies, many consumer actions are better addressed on a broader scale. Consumers who are injured by virtue of a violation of the antitrust laws may be spread throughout a particular region or even the entire nation, without a sufficient concentration in any one state to justify the attorney general of that state bringing a separate action.

Also, while many state attorneys general have been vigorous in enforcing antitrust laws, the resources and experience of the United States Attorney General and the FTC are unquestionably superior. Certainly there can be no harm in granting them discretion to institute such actions if they decide to do so.

What I espouse is in the general public interest. Indeed, it is opposed to my own personal interest because it will lessen the opportunity for private class action antitrust damage suits which constitute a substantial aspect of my firm's law practice.

The proposed amendment would also permit the final award to be distributed to the class and its individual members. Under the current parens patriae statute, it is not entirely clear whether the funds obtained are to be retained by the state, or whether they could be disbursed to the members of the class. This amendment would make it clear that the court has discretion to distribute the award to those persons on whose behalf the action was brought.

B. Injury To the United States

The second amendment to the bill corrects an anomaly in the antitrust laws. Currently, a private plaintiff who prevails in a civil antitrust action can recover treble damages, but the United States suing as an injured party can only recover its actual damages.

There is, of course, no reason for this anomaly to be perpetuated. Treble damages function as a punitive damage remedy intended to deter violations of the antitrust laws. Certainly, there is no reason why persons whose conduct injures the United States should be subject to a lesser remedy than persons whose conduct injures private plaintiffs. Moreover, there is no reason why the United States should be denied a right enjoyed in identical situations by every private litigant.

C. Divestitures

The third amendment contained in the AIA involves the creation of an entirely new procedure for dealing with divestitures which are ordered in connection with acquisitions.

Specifically, a new Section 7B is added to the Clayton Act which provides that no acquisition which requires a divestiture shall be deemed final until that divestiture is approved by the FTC or the Court. The new section goes on to require that a divestiture shall not be deemed an acceptable remedy for an acquisition unless that divestiture fully restores competition lost as a result of the acquisition, and there is a substantial likelihood that any buyer of divested assets will be a viable competitor for the foreseeable future.

The purpose of this amendment is to assure that an anticompetitive acquisition will not be approved just because a token divestiture of assets is made. On some occasions the divestiture imposes a relatively insignificant burden on the acquiring company; on other occasions, the acquiring company may actually welcome the divestiture. This provision requires the FTC or the Court affirmatively to evaluate the proposed divestiture and determine that it furthers the policies of the antitrust laws.

D. Intervention

The AIA creates a procedure whereby a state can intervene if a proposed divestiture has a negative impact on employment in that state. Specifically, if the proposed divestiture affects facilities which have more than 100 full-time employees, the state may intervene as of right in any such proceeding. This amendment must be read in connection with the new Section 7B which requires that the Court, the FTC and the Attorney General, in approving a divestiture, must consider the interests of affected employees.

This provision is intended to minimize the dislocations created by acquisitions and divestitures. Decisions regarding divestitures are often made with insufficient concern given for the individuals affected. This provision would permit a state to intervene in situations where an acquisition or divestiture has a negative effect on a substantial number of employees.

The bill does not require the Court to abide by the State's views, or to deny divestiture because of loss of employment, but only to consider the state's views which may then be given such consideration as appears appropriate in light of the total picture.

E. Dismissals, Consent Decrees and Modifications

Section 6 of the AIA amends section 5 of the Clayton Act insofar as it pertains to Dismissals, Consent Decrees and Modifications of Consent Decrees in civil actions brought by the United States under the antitrust laws.

Specifically, it provides that a civil proceeding can only be terminated upon order of the court, that a motion for dismissal made by the United States shall be filed with the court at least 60 days prior to entry of the order of dismissal, and that the motion shall simultaneously be published in the Federal Register. In addition, at the same time that the motion is filed, the Justice Department shall file a "competitive impact statement" which shall explain the nature of the proceeding, set forth a description of the events giving rise to the alleged violations, give an explanation of the proposed consent judgment, give a description of the remedies available to a private plaintiff, and set forth a description of alternative remedies considered by the United States. Competitive impact statements are also required to be filed in the case of a proposed consent decree or a proposed modification of a consent decree.

The competitive impact statement procedure reflects an awareness, long explicit in antitrust law, that industrial reorganization is not solely a matter of concern to industrial managers and governmental lawyers, but to the broader public as well. It creates a vehicle by which the court, in evaluating a proposed dismissal, consent decree or modification of a consent decree, could obtain perspectives and insights which may not be available from the submissions made by the litigating parties.

F. Private Enforcement

The final section of the AIA permits any person who is adversely affected by a competitor's violation of Section 7 of the Clayton Act to seek appropriate injunctive relief.

This provision is intended to remedy the Supreme Court decision in Cargill, Inc. v. Monfort of Colorado, Inc., 93 L.Ed 2d 427 (December 9, 1986). In that case, the Supreme Court held that a competitor did not have standing to challenge a proposed merger of two of its competitors because the plaintiff in that case could not demonstrate antitrust injury. As a practical matter, however, the injured competitor is the person in the best position to challenge an unlawful merger or acquisition. It has the incentive, the resources and the familiarity with the facts to mount an aggressive and prompt challenge. This amendment clarifies the right of a competitor to bring an injunction action which was placed in doubt by Cargill.

Taken as a whole, the AIA is a necessary antidote to some of the takeover excesses of this decade, and I would urge this subcommittee to expedite its enactment.

Senator **Metzenbaum**. Senator Thurmond, do you have anything further?

Senator **Thurmond**. We do not have time now.

Senator **Metzenbaum**. I think not. I think we had better recess and go to the floor for a vote, and we will be back.

[Recess.]

Senator **Metzenbaum**. The hearing will come back to order.

Mr. Vladeck, we will be happy to hear from you on behalf of Public Citizen Litigation Group; and Jerry Cohen, of Cohen, Milstein and Hausfeld, Washington, DC. We are happy to have both of you here.

Please proceed, Mr. Vladeck.

STATEMENT OF A PANEL, INCLUDING: DAVID C. VLADECK, PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON, DC, AND JERRY S. COHEN, COHEN, MILSTEIN AND HAUSFIELD, WASHINGTON, DC

Mr. **Vladeck**. Thank you, Mr. Chairman.

I am commenting today on S. 1407. Public Citizen strongly endorses this bill and urges its swift passage.

Reform of the Tunney Act is essential to restore public confidence in the way that the Antitrust Division settles or otherwise resolves antitrust cases.

Public Citizen is a nonprofit nationwide organization of about 70,000 members. It has long supported strong antitrust laws and vigorous government enforcement of those laws. After all, it is the consumers who are the prime beneficiaries of the antitrust laws, and they ought not to be frozen out of the process by which these cases are settled.

As set forth more fully in my prepared statement, we think this legislation is needed to strengthen and to clarify the Tunney Act, essentially to put it back into the position that it was designed for in 1974.

Obviously, the most serious problem with the Tunney Act to date has been where the government simply chooses to walk away from an ongoing antitrust case and enters into a consent dismissal which closes the case once and for all. The government did this in *United States* v. *IBM;* it did it in a number of other cases.

Although the courts have not been fully consistent in this area, they have in a number of instances approved the government simply closing the door on these cases without application of the Tunney Act. We believe that reform is imperative to close this loophole in the Tunney Act's coverage.

From the public's standpoint, there simply is no material difference between a consent dismissal and consent judgment. They both end the case. They both signal to the public, to the business community, and to the Bar, what sort of market conduct will be tolerated.

They both cut off the possibility that private parties will be able to use the government's case to prove a violation. And most importantly of all, they all raise the specter that the public is getting short-changed.

Antitrust cases are a unique breed. The defendants almost invariably have considerable political and economic power. As a result, the potential for abuse is always lurking, and regrettably, abuses have occurred. Reform thus is needed to root out even the possibility of secret dealing.

We have seen secret dismissals in *U.S.* v. *IBM,* in *U.S.* v. *Mercedes-Benz,* and in other cases. We simply do not need any more of them.

There is another point that I would like to very briefly touch on, and that is that the Tunney Act helps prevent radical shifts in the way the government views the antitrust laws. I would simply like to use tying arrangement cases as an example.

The government did not walk away from *U.S.* v. *Mercedes-Benz* because it had a weak case. Indeed, it had already prevailed on major portions of that case. It walked away because then Assistant Attorney General Baxter held the view that tying arrangements ought not to be illegal.

Putting aside the question of whether then Assistant Attorney General Baxter's view of the law was a correct one, or even a supportable one, the Tunney Act is essential to provide a check on the Antitrust Division's ability to transform the law unilaterally by walking away from a case.

The strength of the Tunney Act is that it highlights the issues; it allows for full-scale public debate, and ensures a substantial degree of accountability.

Everything that I have said also holds true for modification of existing decrees. We obviously do not oppose categorically the modification of consent decrees. Times and circumstances change, and in some cases modification of a decree may be warranted. But we cannot fathom any basis for the government to contend that it can, at any time after the entry of a decree, simply modify it consensually without any explanation to the court or to the public as to why it is doing so. Far too much is at stake to leave the process outside the scope of the public scrutiny.

The *AT&T* case is a prime example of the good that can flow from application of the Tunney Act to modifications of consent decrees, and there are numerous other examples.

For these reasons, we strongly urge the adoption of S. 1407. If you have any questions I would be delighted to answer them.

Senator METZENBAUM. Thank you, Mr. Vladeck. First, we will hear from Mr. Cohen.

[Statement follows:]

TESTIMONY OF DAVID C. VLADECK, ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP, BEFORE THE SENATE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES, AND BUSINESS RIGHTS, ON S. 1407, THE ANTITRUST REMEDIES IMPROVEMENT ACT OF 1987

June 30, 1987

Mr. Chairman; Members of the Subcommittee: Thank you for the invitation to appear before you today to comment on S. 1407, the Antitrust Remedies Improvement Act of 1987. Public Citizen strongly endorses this bill and urges its swift passage. Reform of the Antitrust Procedures and Penalties Act is essential to restore public confidence in the integrity of the process by which the Antitrust Division of the Department of Justice settles or otherwise resolves government-brought antitrust cases.

Public Citizen is a non-profit, nation-wide consumer organization with 70,000 members. It has long supported strong antitrust laws, and vigorous government enforcement of those laws. Public Citizen also has considerable expertise in this area. Its attorneys represented Ralph Nader and Reuben Robertson, the unsuccessful applicants for intervention in _United States v. International Telephone & Telegraph Corp_., 349 F. Supp. 22 (D. Conn. 1972), _aff'd mem. sub nom. Nader v. United States_, 410 U.S. 919 (1973), who sought to challenge the propriety of the Department of Justice's handling of the settlement of that case. As the Subcommittee is no doubt aware, it was Congress' dissatisfaction with the Department of Justice's role in the _IT&T_ case, coupled with allegations of other abuses by the Antitrust Division in settling cases, that led to the passage of the Antitrust Procedures and Penalties Act in 1974. Public Citizen's lawyers worked with this Subcommittee and its House counterpart for the passage of the Act, and, since then, we have sought to preserve the vitality of the Act through litigation. Over the years, Public Citizen has been involved in a number of cases addressing the applicability of the Antitrust Procedures and

Penalties Act to proposed dismissals of government-brought antitrust cases and modifications of existing consent decrees.[1]

BACKGROUND

This proposed legislation is essential to ensure that the Antitrust Procedures and Penalties Act of 1974 (commonly referred to as the "Tunney Act," after its sponsor) serves the purposes for which it was designed. As the Subcommittee well knows, the Tunney Act was designed to open to public view the process by which the Antitrust Division settles or disposes of antitrust cases and to improve the process by encouraging informed comments evaluating the proposed settlement. Equally important, the legislation sought to remedy "judicial rubberstamping" of consent decree proposals by district courts. H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). Congress believed these measures were necessary to assure "the integrity of and public confidence in procedures relating to settlements via consent decree" by substituting "sunlight" for "twilight." Id. at 6.[2]

To accomplish these goals, the Tunney Act sets forth detailed procedures to be followed prior to the resolution of a government antitrust case. To begin with, the government must prepare a competitive impact statement setting forth a description of the challenged practices, an explanation of the parties' proposal, a discussion of the remedies available to private plaintiffs, and an evaluation of alternatives to the decree. This statement must be filed with the court along with the proposed decree, and both must be published in the Federal Register at least 60 days prior to the decree's effective date. Copies of "determinative" documents must be made available to the public, and the government must publish summaries of the proposed decree and the competitive impact statement in certain general circulation newspapers. The government must consider written comments, and publish its responses in the Federal Register. Within ten days of the filing of the decree, the defendant must file a description of all communications -- except those by counsel of record with the Justice Department -- with government officials concerning the proposal. Finally, prior to approving the decree, the district court must "determine that entry of such judgment is in the public interest."

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[1] See, e.g., In re IBM, 687 F.2d 591 (2d Cir. 1982)(holding Act does not apply to dismissals); United States v. Mercedes-Benz of North America, 547 F. Supp. 399 (N.D. Calif. 1982)(same); United States v. American Telephone & Telegraph, 552 F. Supp. 131, 143-53 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983) (holding Act does apply to dismissals); United States v. Motor Vehicle Manufacturers' Ass'n, C.A. No. 69-75-JWC (C.D. Calif. Orders of Nov. 19, 1981 and Jan. 14, 1982) reprinted in 1981-2 Trade Cas. ¶ 64,370 (holding Act applicable to proposed modifications).

[2] See Note, The ITT DIvidend: Reform of the Department of Justice Consent Decree Procedures, 73 Colum. L. Rev. 594 (1973); Campbell & Hammond, Consent Decree Procedures After the ITT Settlement, Some Comments on the Proposed Antitrust Procedures and Penalties Act, 23 Am. U. L. Rev. 571 (1974).

As is evident, the purpose of the Tunney Act is to ensure that Justice Department officials are accountable to the public. Secret dealing of the sort that led to the IT&T giveaway was to be banned. By opening the process up to public scrutiny, and placing minimal burdens on the government to explain why it taking a particular path, Congress intended to end abuse in the process once and for all. Nonetheless, in recent years the Administration has sought to evade the Act, again raising the specter of impropriety that led Congress to enact the Act in the first place. This Administration has sought to avoid the Act's public disclosure provisions by arguing that the Act simply does not apply in two critical areas: first, when the government proposes to dismiss an antitrust case outright, and second, when the government seeks to modify an existing consent decree. Once again, the public has been entirely excluded from the process -- and that clearly has been the Administration's chief goal.

We believe that the construction of the Tunney Act proffered by the Administration cannot be reconciled with the Act's fundamental purposes and thus corrective legislation is necessary. Government antitrust cases are brought to vindicate the interests of the public at large -- to compel a remedy for illegal behavior, to restore competition, to place a check on the improper use of what is often awesome economic power, and to deter other entities from engaging in anti-competitive behavior. Congress was well aware that, by definition, antitrust violators wield great influence and economic power. They often bring significant pressure to bear on the government, and even on the courts, in order to get the most favorable disposition of their case as is possible. Thus, when the Justice Department determines to abandon a case without obtaining any relief, or to modify an existing consent decree to give away a remedy it has already won, or even to settle a case for less than it claimed it was entitled to, there is inevitably a legitimate and compelling public interest in the reasons that led the Department to alter its course. The public has a right to know that it is not getting short-changed.

Several cases in which Public Citizen has been involved illustrate the problems with the Administration's interpretation of the Tunney Act. The most compelling example of such an abuse occurred in January 1982 when the Department of Justice simply walked away from the most massive case ever litigated, United States v. IBM. Public Citizen takes no position on whether the decision to dismiss the IBM case was a correct one. Antitrust experts will debate that issue for decades, and we leave that judgment to history. Our point is simply that the government cannot be allowed to voluntarily dismiss an ongoing antitrust case without telling the Court and the public why.

The Department of Justice filed the IBM case on January 17, 1969, alleging that the IBM had monopolized the market for general purpose digital computer systems in violation of the Sherman Act. The trial concluded in June 1981. All that remained at that time was for the court to issue its findings of fact and conclusions of law; no additional evidentiary proceedings were needed. Although the case was ready for judgment, and no settlement had been reached during the prior twelve years of litigation, the parties, following the change in Administrations, decided to attempt to settle the case. After what both IBM and the government acknowledge were extensive, closed-door negotiations, the parties entered into a stipulation of dismissal which they filed with the Clerk of the Court. No court approval was sought. The stipulation, signed by then-Assistant Attorney General William F. Baxter, stated, _inter alia_, that the "plaintiff has concluded that the case is without merit and should be dismissed." The only announcement to the court came at a hearing held at the request of the parties at which time the court was informed that the case had been terminated. Although the dismissal was the subject of enormous public interest, and undoubtedly had a profound impact on many of the private antitrust actions pending against IBM at that time, the Department of Justice provided almost no information about why it had decided to do an abrupt about-face. Once again, the Antitrust Division was in the business of striking secret deals.

Because of the importance of the _IBM_ case, Public Citizen appeared as an _amicus curiae_ to advocate the applicability of the Tunney Act. We contended that the Act was designed to apply to dismissals, as well as settlements. We pointed out the anomaly of the government's position. No one doubts that a consent dismissal affects the public just as directly as if the government settles the case through the entry of a consent decree. Yet, by dismissing the case outright, the government asserted that it had no obligation to comply with the Tunney Act. We contended that a finding that the Tunney Act is inapplicable to consent dismissals would provide an unbounded opportunity to the government and defendants to evade the Act -- a result which could not be squared with the clear Congressional intent underlying the Act.

Nonetheless, our position did not prevail in _IBM_, although the court did express concern "that many of the considerations which prompted Congress to legislate . . . are also present where dismissals are involved." In re IBM, 687 F.2d 591, 603 (2d Cir. 1982). Shortly after the IBM dismissal was effected, the Department dismissed a number of other antitrust cases, including United States v. Mercedes-Benz -- an important case in which the Department had alleged that major automobile manufacturers were driving up the cost of replacement parts to consumers through illegal tying arrangements.[3] In no case did the Department explain the basis for its action, much less provide the public the detailed justification required by the Tunney Act.

The Justice Department has also sought to avoid application of Tunney Act procedures when it has sought to modify existing consent decrees. Thus, for instance, the government joined with the defendants to gut the decree in United States v. Motor Vehicle Manufacturers' Ass'n. That decree, aptly known as the "Smog Conspiracy Decree," had been entered in 1969, after the Justice Department charged that the major automobile manufacturers had conspired to restrain the development of pollution-control devices. For years, this decree had been touted as an indispensible tool in forcing the auto-makers to help clean-up the air. Indeed, during the late 1970s the Justice Department, at the insistence of EPA, urged its extension. Nonetheless, without any notice to the public, this Administration -- as part of its attempt to bail-out the auto industry -- entered into a secret deal to withdraw the government's motion to extend the decree, and then turned around and proposed to weaken and eventually terminate it. Public Citizen, on behalf of the Center for Auto Safety, successfully blocked the government's efforts to gut the decree in secret. In an important ruling, the district court held that the Tunney Act applied to proposed modifications of consent decrees, and required the parties to comply fully with the Act. United States v. Motor Vehicle Manufacturers' Ass'n, 1981-82 Trade Cas. ¶ 64,370.

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[3] While perhaps a claim could be made that the Department abandoned the IBM case because it was unwinnable, no such argument can be made with regard to Mercedes-Benz. There, the government had already won a number of important pre-trial rulings, which made it clear that it had a very strong case on the merits, see 1981-82 Trade Cas. ¶ 64,188 (N.D. Calif. 1981). In addition, a favorable consent decree had recently been obtained by a private plaintiff in a parallel action. Technical Learning Collective, Inc. v. Mercedes-Benz AG, C.A. No. N-77-1443 (D. Md. 1981).

Although the government did not appeal the court's ruling in the Motor Vehicle Manufacturers' Ass'n case, it has not strictly followed it. In a number of cases in recent years, the government has simply disregarded the Tunney Act when it has entered into modifications of existing consent decrees. Apparently, the Department believes that it is above the law.

S. 1407

Our experience leads us to strongly support the Antitrust Remedies Improvement Act of 1987. This bill would close the existing loopholes in the Tunney Act and would force the government to comply with the Act's disclosure requirements whenever it wants to either walk away from or otherwise resolve an ongoing antitrust case. The Administration's contempt for the Tunney Act in recent years has proven that the Act's purpose was right on target -- the Department needs to be held accountable -- but that a Department of Justice intent on evading its provisions can do so. In our view, the reasons why the Tunney Act procedures are vital for settlements of antitrust cases apply with full force to dismissals and modifications. Thus, passage of S. 1407, which would strengthen and clarify the principles of the Tunney Act to assure that they apply to dismissals and modifications as well as settlements, is imperative. The public has a legitimate and compelling interest in being informed about the disposition of any government antitrust case, a goal which S. 1407 would achieve.

We do, however, have some comments about the drafting of S. 1407. First, section 6(b) provides that antitrust cases brought by or on behalf of the United States "may be terminated only upon order of the court before which such action is pending." The word "terminated" is not one that appears in the Federal Rules of Civil Procedure, nor is it a term of art with a recognized meaning in litigation. Although we believe that the intent of S. 1407 is clear, we are troubled that lawyers intent on sidestepping the statute would argue that a voluntary dismissal of an action under Rule 41(a)(1)(i) or (ii) of the Federal Rules of Civil Procedure -- particularly one that states that the dismissal is without prejudice -- does not constitute a "termination" of the action. Thus, we would propose that the Subcommittee amend the language of section 6(b) to conform to that of the Federal Rules by substituting the word "dismissed" for "terminated."

Second, section 6(c) provides that "any motion for dismissal made by the United States" is subject to the provisions of the Act. As written, this provision inadvertently carves out a gaping loophole in the Act's coverage, since any voluntary dismissal can be made without filing a "motion," and thus would not fall within the scope of the Act. Once again it is necessary to focus on Rule 41(a)(1). Subsection (i) of that Rule allows the plaintiff to dismiss an action without court approval or even the consent of the defendant "at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." And subsection (ii) allows for dismissal at any time -- even after trial -- without court order, "by filing a stipulation of dismissal signed by all parties who have appeared in the action." That is precisely what happened in the IBM case. As is evident, section 6(c)'s reference to a "motion" defeats the very purpose of the provision, since voluntary dismissals, by definition, are not filed by motion. To compound the problem, the phrase "motion for dismissal" is used throughout S. 1407.

To cure this drafting defect, we would propose that the phrase "motion for dismissal" be deleted throughout the Act. As a substitute, we would urge that the phrase "notice or stipulation of dismissal" be used, or that language be inserted into the Act that expressly forbids the United States from entering into Rule 41(a) dismissals in cases brought under the antitrust laws. In any event, this is a drafting problem that needs to be rectified.

Third, in several sections of S. 1407, e.g. section 6(c), the Act requires that the United States make available to the public "materials and documents which the United States considered determinative" in formulating its position. We have no objection to the retention of this language, which was used in the Tunney Act. Historically, however, the Department of Justice has construed this language as narrowly as possible to prevent public disclosure of documents. Indeed, in many cases, it took the position that no documents whatsoever should be made available under this provision. While there was considerable litigation over this point, we urge the Subcommittee to clarify Congress' intent by expressly adopting the standard articulated in United States v. Central Contracting Co., 531 F. Supp. 133, 134 (E.D. Va. 1982) -- namely that the "materials and documents that substantially contribute to the [Justice Department's] determination to proceed" along a particular path must be disclosed. We believe that a reference to this decision in the report of this Subcommittee on S. 1407 should be adequate to resolve this problem.

There is one final point that we would like to address briefly. One question that has been lurking ever since the dismissal of the IBM case is what should be done where the district court finds that a proposed consent dismissal is not consistent with the public interest. In a number of cases, including both IBM and Mercedes-Benz, the government argued that application of the Tunney Act to require it to continue to prosecute a case its does not wish to pursue would violate the separations of powers doctrine. Obviously, nothing in S. 1407 goes that far, or could be read to suggest that the district court could compel the Department to continue to pursue a case it contends should be dismissed.

However, the Supreme Court has recently made clear that, in certain circumstances, special prosecutors who are not officials of the Executive Branch may be appointed to pursue enforcement actions on behalf of the United States. Young v. United States ex rel. Vuitton et Fils, No. 85-1329 (U.S., May 26, 1987). This decision lends considerable strength to the proposition that, where the district court is convinced that abandonment of an action brought by the government is not in the public interest, the court could appoint a special prosecutor to carry the litigation forward. We do not take the position here today that S. 1407 should be amended to provide expressly for that possibility. We do, however, submit that it is an avenue that is worth the Subcommittee's consideration.

This concludes my prepared statement. I would be happy to respond to your questions.

Senator METZENBAUM. Mr. Cohen.

STATEMENT OF JERRY S. COHEN

Mr. COHEN. Thank you, Mr. Chairman.

I would like to take my few minutes here to try to put the work you are doing, both in S. 1407 and in your Monsanto bill, in some kind of perspective, because I think sometimes we get so tied up in words and legalities that we forget what the big picture is.

This is our 200th anniversary, as everybody knows, of the U.S. Constitution, which is our charter of political freedom. At the time that the Constitution was being considered, Thomas Jefferson, who unfortunately was in France at the time and had to write letters to be heard, was very concerned about the relationship between economic power and political power. And he was trying to get James Madison to put in the Constitution an antimonopolies provision. Unfortunately, he not being there, it never got in.

But it was quite obvious when you went into the 1800's and the big trusts came about that it is fine to have a political document like the Constitution that deals with political and governmental tyranny, but what you were finding out is that because of the relationship between economic power and political power, that corporate tyranny was almost as big a problem. Indeed, Henry James expressed concern at the time that the corporations would be taking over the government the way things were going. And thus the populist movement was born.

The Sherman Act was passed and was intended to be, as the Constitution was, a document to curtail corporate tyranny the same way the Constitution was to curtail political tyranny. And up to almost the present day, the Sherman Act and the subsequent antitrust laws have not been a Democratic doctrine or a Republican doctrine—they have been everyone's doctrine.

And indeed, when Senator Hart held the same position you hold now, and when I was chief counsel to that committee, when we had our economic concentration hearings, our strongest supporter was Senator Goldwater, who believed that economic power had to be disbursed.

So if you believe that, if you believe that our society is in fact shaped by who holds the power in that society, then you have got to believe strongly in powerful antitrust enforcement. You do not have it in the government, so what is left? What is left is the private bar. I am here to tell you as a representative of a group that I think has probably 10 of the dozen top plaintiffs' antitrust firms in the country as its membership, that most of us are moving out of antitrust and into other areas, and I would like to take a minute to tell you why.

There are three basic reasons. Number one, given the present state of the law, it is almost impossible to get by a summary judgment in the average antitrust case unless you have a smoking document. And even the good judges—who I call "good" obviously are the ones that have a liberal attitude toward antitrust—even those judges, when you go up and argue, say "Well, Mr. Cohen, do you have a smoking document?"

You may have spent years building up your evidence. But given the misrepresentation in the lower courts, the misinterpretation, of both *Monsanto* and *Matsushita,* you put those two together—the *Monsanto* idea that if a fact is equally consistent with innocence as with guilt with the *Matsushita* test of plausibility—you are hard-put to even get past a summary judgment motion.

Added to that is the pervasive influence of the Chicago School of Economics now in the courts. The Chicago School of Economics, which postulates a marketplace that does not exist and builds a whole theoretical system on that, does not care about behavior because it cannot happen because manufacturers and corporations obviously are only motivated by the desire to maximize profits, and therefore predatory practices cannot occur, et cetera, et cetera—you have heard the arguments here before. That has so permeated the courts now that if you are a plaintiffs' antitrust lawyer, you do not bring a case in the seventh circuit, period, because you have got Judge Posner sitting on the bench and Judge Easterbook, and they do not believe in antitrust because the marketplace will take care of everything.

The Chicago School in effect is to the doctrine of economics what the old anarchist movement used to be to political science. Everybody is totally free, so the world is going to run beautifully—except it does not work that way.

And in this circuit, since Judge Bork has been on the bench, there has been an incredible change because Bork also is a member of that school, and I suspect that is a problem that your committee is going to have to wrestle with at some other time.

If you accept these premises—and I am here to tell you on the one hand what plaintiffs' antitrust work is about today; we are going into environmental torts primarily now, just because it has gotten so difficult—then of course, you have got to support your bill, particularly the *Monsanto* bill, and particularly section 7 of this bill which gives standing to competitors or targets of merger, merger takeovers.

And of course, we oppose bills such as the administration has that are going to make it not only difficult but almost impossible to bring antitrust suits.

And one note on that that I notice no one has mentioned yet. That business in the administration bill about having the plaintiffs pay defendants' attorney fees means—and I say this absolutely with certainty—you will not have, if ever that should ever pass, any more class actions in antitrust suits, because no person who subjects himself to being a plaintiff in a class action suit is going to do so if he is looking at paying $150,000 or $200,000 in attorneys fees somewhere down the line.

Thank you very much.

Senator **Metzenbaum**. Thank you.

[Statement follows:]

PREPARED TESTIMONY OF
JERRY S. COHEN

Mr. Chairman and Members of the Subcommittee, my name is Jerry S. Cohen and I practice antitrust law here with the firm of Cohen, Milstein & Hausfeld. I appreciate the opportunity to testify concerning S. 1407, "The Antitrust Remedies Improvements Act," introduced by Chairman Metzenbaum; and Sections 201-217 of S.635, introduced by Senator Thurmond. I offer this testimony both on my own behalf and as a director of the Committee to Support the Antitrust Laws, a national group formed to defend antitrust and competition principles.

I've been involved with antitrust law and policy for a long time. After a stint as Assistant Attorney General of Michigan in charge of the Criminal Division, I came to Washington to work for the late Senator Philip A. Hart on the Antitrust and Monopoly Subcommittee of this Committee; from 1963 to 1969, I was Chief Counsel and Staff Director of the Subcommittee. For the past eighteen years, I've been in private practice here in Washington specializing in representing victims of antitrust violations. Along the way, I co-authored two books directly relevant to the role that I see for antitrust in our national life: "America, Inc." and "Power, Inc."

In my experience, things have never been worse for the public and private interests that antitrust is supposed to protect, among them, consumers, discounters, innovators and small businesses. That is why recently I and a number of my colleagues at the antitrust bar formed the Committee to Support the Antitrust Laws. We intended COSAL as a support group for antitrust because, frankly, we feared that powerful interests would team up with a few "Chicago School" economists to make antitrust a dead letter. One of the few bright spots in the past few years has been the constant and strong efforts of Senator Metzenbaum to preserve and defend the free enterprise system.

I.

Senator Metzenbaum's bill, S. 1407, embodies six separate sections. Four would primarily augment the power of the federal authorities to enforce the antitrust laws, one would primarily benefit the state attorneys general, and one would assist private parties to enforce the Celler/Kefauver amendments to the Clayton Act. I do not perceive any of these changes individually as a momentous shift in policy: rather, most are "perfecting" adjustments necessary to close loopholes or cure anomalies. Taken as a whole, however, the bill is important for at least two reasons. First, the sum of the adjustments in the bill will be a marked overall improvement in antitrust enforcement capabilities. Second, it is appropriate that Congress exercise its power to fine tune the antitrust enforcement system to show that it continues to monitor and care about the mechanisms for enforcement of the free market system.

Turning to the bill itself:

* Section 2 would extend Section 4C's parens patriae power from the state to the federal enforcement authorities; the Antitrust Division of the Department of Justice and the Federal Trade Commission would now be empowered to bring parens patriae suits. This proposal would appear to be a logical and sensible extension of the power of the states' attorneys general. Action by the federal authorities would appear equally if not more appropriate than action by a particular state in national conspiracies in which the victims are spread across America, in some international cases (where the antitrust authorities might need help from the Department of State) and in particularly resource-intensive cases.

At the same time, I believe it's extremely important to guard legislatively against the possibility of misuse of this section by the Antitrust Division and the Federal Trade Commission. Based on their prior record, I think we can all safely assume that the current federal antitrust authorities will not lift a finger to enforce the parens power except if doing so would misserve the purpose of antitrust, in which case one could easily imagine them pulling a muscle to assert themselves. For example, it is conceivable that the federal antitrust authorities will try to use their parens power to cut off damage awards through private actions, by suing on behalf of a class of purchasers and then seeking to cut off all private rights through a court order under section 2(a)(5). In such a situation, it would be preferable for individuals to be able to pursue their own rights. I believe that you should consider making clear, either in the bill itself or in legislative history, that the federal parens power could not be used to preempt or preclude private actions in this manner.

It is also conceivable that a defendant will argue that the failure of the federal authorities to act in a particular case preempts action by the states. The legislative history should clearly reflect that the federal parens power is cumulative and the failure to use it in no way precludes actions by the state attorneys generals.

* Section 3 would provide for treble damages for injuries to the United States in its proprietary capacity. States that sue in their proprietary capacity are already persons under Section 4 and can recover treble damages. State of Georgia v. Evans, 316 U.S. 159 (1942). There is no reason in this, the Age of the Megadeficit, to put federal taxpayers in a worse position than state taxpayers or consumers.

* Section 4 would address consent agreements that provide for a divestiture. It seeks to make sure that the divested assets are spun-off to a competitively viable entity. Situations such as that which occurred with the Massillon steel facility in the LTV-

Republic merger are extremely troubling. The Department of Justice and the Federal Trade Commission should never permit such events to recur. Obviously, however, in their headlong efforts to approve any merger based on any excuse, they have shown themselves as almost unbelievably indifferent to their responsibilities. The concept of legislation is therefore sensible both in human terms and for the sake of preservation of competition.

Section 4 would create a procedural requirement that any divestiture pursuant to a consent agreement not be final until the divestiture has been approved by either the court or the Federal Trade Commission. Substantively, it provides that a divestiture will not be an acceptable remedy unless it "fully restores competition" and "there is a substantial likelihood that any buyer of divested assets will be a viable competitor . . . ." These provisions are, I think, positive and necessary.

Evasion of the section -- for example, by spinning off assets immediately in advance of a merger -- is a serious concern. If the divestiture is for any reason not covered by the consent agreement, the procedural requirements of section 4 would be inapplicable. You may wish to consider making clear that voluntary merging parties who have divested assets to avoid a competitive overlap may not merge unless the divested assets are in the hands of a viable entity.

* Section 5 provides for intervention by the states' attorneys general in Tunney Act proceedings when the divested assets in a state employ 100 or more persons. Clearly, the current federal authorities, who essentially believe that the only goal of antitrust is corporate efficiency, do not care about local conditions and regional trauma. The intervention of a politically accountable antitrust authority is therefore necessary when jobs and plant closings are at stake.

I think there's a case for making the threshold less than 100. The transfer or loss of a facility employing 100 people affects not only the 100 employees, but the suppliers and customers of the facility and those who provide goods and services to the employees. In a state without a large population, the multiplier effect of losing a facility employing 99 could be significant. At minimum, you may wish to make clear that by establishing mandatory intervention at 100 lost jobs, you do not mean to preclude the court permitting intervention at 99.

* Section 6 would rewrite the Tunney Act settlement procedures to encompass dismissals and decree modifications. Before approving a consent judgment or a modification, it would require the court to determine that the judgment or modification was in the public interest. Before entering an order of dismissal, it would require the court to determine whether or not it is in the public interest; the court would have no power to disapprove such a dismissal.

The Tunney Act proposals are apparently a response to the positions the Department of Justice asserted in the IBM, AT & T and other cases. The policy of the Tunney Act is to prevent closed-door "sweetheart" settlements between the Antitrust Division and powerful companies by requiring judicial approval of settlements after limited notice and comment procedures. The nation's interests can be misserved in dismissals and in modifications just as it can in original consents; therefore the Tunney Act should apply in these situations.

I think there's a strong case for requiring judicial approval of dismissals. Clearly, a dismissal with prejudice can leave the public worse off than a consent. Although such an extension would probably contradict the current Department of Justice's expansive views of the powers of the Executive Branch, I would point out that Federal Rule of Criminal Procedure 48(a) requires judicial approval before an indictment is dismissed. Therefore, there is precedent to support judicial approval of the use of prosecutorial discretion to dismiss a case.

* Section 7 would clarify that competitors have standing in suits to enjoin anticompetitive mergers. In view of possible restrictive interpretation of Cargill, Inc. v. Montfort of Colorado, Inc., 107 S.Ct. 484 (1986), by the lower courts - - as has occurred with respect to Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464(1984) - - legislative clarification is appropriate. As a practical matter, the laxity in enforcement by our antitrust authorities means that Section 7 will be an important change.

II.

Sections 201-217 of Senator Thurmond's S. 635 encompass three concepts: "claims reduction," "detrebling" and attorneys' fees for prevailing defendants. These provisions are a part of the Administration's overall antitrust "reform" package. Each of these proposals, if enacted, would introduce a deadly toxin into the system of private antitrust enforcement; taken together, they would probably cause the system to wither and die. For this reason, I wanted briefly to describe why it is essential that that system be preserved.

Antitrust violations cause real damage to real people. Almost all antitrust violations directly raise the prices your constituents pay for their goods and services. Price-fixing, tying and predation are all designed, in economic parlance, to extract monopoly rents. For example, price-fixing directly imposes a hidden sales tax that goes not for the public good, but for the private benefit of price-fixers. If your citizens do not care about the prices they pay -- if they have a surfeit of money -- then Congress should not much care about price-fixing. If they do care about prices and taxes -- and I think that the strong opposition to tax increases shows a genuine concern about pocketbook issues -- then Congress needs to take strong action to protect the public.

Antitrust violations may also deprive would-be entrepreneurs of fair business opportunities. While we all understand that a would-be entrepreneur assumes the risks of the market in betting his or her savings on a new enterprise, economic bullying and predation by powerful competitors are not among the risks assumed.

Private enforcement is fair, efficient and important as a deterrent. If someone steals your money, our law provides a remedy for you to recover what you have lost. Private enforcement of the antitrust laws is merely a recognition of this principle in the context of white collar theft. It is efficient because it permits a victim to recover on his own behalf -- without government help, red tape or expenditure of public resources. It is an especially important deterrent at this time because of the lack of deterrence from any meaningful federal enforcement program.

As I noted above, claims reduction, detrebling and attorneys' fees for prevailing defendants are each proposals that would hurt alleged victims and help alleged perpetrators. If joint and several liability and treble damages were taken away, victims would lose important tools in litigation. Before making these changes, Congress should empirically determine that the existing scales are somehow unbalanced in favor of plaintiffs, taking into account the full panoply of relevant considerations.

I believe that an objective, empirical study would show that plaintiffs are relatively disadvantaged in antitrust litigation. Plaintiffs have no incentive to bring marginal (much less frivolous) cases. It takes years and years of delay, risk, expense and frustration for a plaintiff to succeed in any antitrust case. Plaintiffs and their attorneys frequently have to borrow the money to pay for litigation. If the plaintiff loses, it will have enormous costs and maybe enormous debt. Plaintiff's lawyers who work on a contingency fee basis only get paid if they win.

The chances of an innocent defendant being held liable are very remote. Indeed, with more and more court decisions relying upon the "Chicago School" of economic thought, it is extremely difficult for plaintiffs to get their cases even to a jury. The Supreme Court's decisions in cases such as Monsanto and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986) - - and the progeny of these cases - - have created substantial obstacles. Even in the rare cases in which "smoking gun" documents exist, it is sometimes still not possible to get a jury determination. See Garment District, Inc. v. Belk Stores Services, 799 F. 2d 905 (4th Cir. 1986).

The procedural rules governing civil actions have a plethora of protections for defendants, including motions to dismiss, Rule 11 motions, motions for judgment on the pleadings, summary judgment motions, motions for directed verdicts, motions to grant judgment notwithstanding the verdict, and motions for a new trial on the grounds that a verdict is against the weight of the evidence. If a plaintiff should emerge victorious in district court, the defendant has full appeal rights. The chances of an innocent defendant being held liable are minute; the chances of a defendant against whom there is no evidence being held liable are smaller than minuscule. Defendants frequently have an incentive to use motion and discovery practice for delay and obfuscation. Frequently, it is possible for a defendant to pay for its litigation costs out of the return on the money it will ultimately have to pay. When it's cheaper to pay the lawyers than forgo the interest, defendants have no incentive to settle or expedite the litigation.

With these considerations in mind, I offer the following specific comments:

* Claims reduction. Sections 203 and 204 create a new defense against damage claims in conspiracy cases in which the plaintiff has settled with some defendants or the plaintiff has not sued all possible conspirators. There are some significant

drafting problems, but I understand the concept is that a plaintiff's verdict will be reduced by the damages "allocable" to settling defendants and that unsued conspirators will be deemed "released from liability." In horizontal price-fixing cases, the damages are allocated on a percentage of sales basis; in other cases, relative responsibility and benefit is the damage allocation formula. These proposals are, I think, based on a misconception that the current system is somehow unfair.

The current system is fair. Would we allow bank robbers to defend civil suits to recover the money they stole on the ground that they received only a share of the loot? Of course not. The robbers are jointly and severally liable. Yet, that is exactly what the legislation would create -- a partial defense based on percentage of overcharge received. I don't think the law should recognize a "share of the loot defense" to robbery or price-fixing.

Similarly we would not allow a robber to defend on the ground that he did not think up the robbery or that he only drove the getaway car. We should not allow antitrust violators a similar defense. I would urge Congress to reject the "it wasn't my idea" defense embodied in the "relative responsibility for the origination or perpetration of the violation" standard.

Joint and several liability also has a practical component. While the legislation purports not to affect joint and several liability, the most important right joint and several liability confers -- the right to select among possible defendants -- is eviscerated. Black's Law Dictionary defines joint and several liability in terms of this selection right: "A liability is said to be joint and several when the creditor may sue one or more parties to such liability separately, or all of them together at his option." (Revised 4th edition, at 972) (1968). If S. 635 is passed, a plaintiff will lose the right to select defendants. Plaintiffs will have to sue all possible defendants. The result will be a significant complication of litigation.

Passage of S. 635 would also discourage settlements. A plaintiff will lose the ability to accept early settlements based on an ability to recover full damages later on. Plaintiffs will have no choice but to demand higher settlements; defendants will have much less incentive to offer settlements; there will be fewer settlements and more litigation. Significantly, plaintiffs will not be able to accept "hardship" settlements from defendants with few resources. The result will be that more companies will experience financial distress as a result of antitrust litigation.

Claims that the current system are unfair are not documented. In the past few years, some proponents have advanced the claim that the legislation is necessary because innocent defendants settle their cases rather than litigate them. Before accepting the claim that a particular defendant was unfairly coerced into settlement, Congress should thoroughly investigate the claim and decide for itself. Was there any evidence of guilt? Did the defendants receive good legal advice? It is easy for a settling defendant to claim it was innocent.

Proponents also claim that defendants "bet their companies" in antitrust litigation. I am unaware of any case in which a company that has approached litigation in a sensible manner has been bankrupted or even severely hurt. None of the currently famous bankruptcies or threatened bankruptcies (e.g., Texaco) due to litigation is on account of antitrust.

* "Detrebling". Sections 212-214 would "reform" the treble damage system. Under section 212, only private plaintiffs who were "overcharged or underpaid" would receive treble damages; all others would receive single damages plus interest from the date of injury, unless the court finds the interest award to be unjust. Section 213 would provide a similar rule for actions by the United States in its proprietary capacity. Section 214 would "detreble" in parens actions. Obviously, these are major changes

that have not been extensively explored by prior hearings.

The treble damage remedy lies at the very heart of our antitrust law. As the Supreme Court has recognized, treble damages are necessary for both deterrence and compensation. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 & n. 10 (1977). Part of the reason for treble damages is the difficulty in obtaining compensation in litigation against powerful interests; another is to provide adequate deterrence.

No facts of which I am aware would justify any detrebling much less the broad detrebling that is contemplated by S. 635. Without treble damages, it will be very difficult even to obtain compensation. I believe that in the vast majority of cases -- even cases that go to trial and in which the plaintiff prevails -- defendants do not even pay actual damages. Reducing the treble damages remedy will also lead to substantially decreased deterrence.

There is also no justification for the distinction that S. 635 would make based on the type of harm the plaintiff experienced. Why should we award treble damages to someone injured by overcharges, but deny it to someone whose livelihood is crushed by predatory conduct? Why should we award treble damages for horizontal price-fixing, but deny it for a business whose supplies were terminated by a vertical price-fixing conspiracy? I see no basis for such a distinction.

* Defendants' Attorneys' Fees. Section 215 would award defendants' attorneys' fees in both private damage and private injunctive actions if the action was "frivolous, unreasonable, without foundation, or in bad faith." With the strengthening of Rule 11, there is no need for such a change. Rule 11 provides a basis to deter frivolous actions. Moreover, there is no reason to provide for defendants' attorneys' fees in antitrust litigation, but not other complex commercial litigation.

If Congress approves this provision, class actions will be severely affected. No one will agree to be a class representative if he faces the prospect of paying attorneys' fees to the defendant in a class action case. If you want to kill the class action device, enact this provision.

In summary, I believe that S. 1407 embodies a series of needed reforms to the system of antitrust enforcement. I believe that Title II of S. 635 threatens the viability of the entire system of private enforcement of the antitrust laws.

Thank you.

Senator METZENBAUM. Mr. Vladeck, as you know, the Tunney Act precludes entry of a consent decree that the court determines is not in the public interest. You note that the government has argued that the same standard cannot be applied to dismissals since the separation of powers doctrine prohibits the court from forcing the Justice Department from prosecuting the case.

What response to that argument did you make when you argued that the Tunney Act applied to the IBM dismissal?

Mr. VLADECK. Well, our argument really is twofold. The first is that there is a beneficial effect in simply having the government justify its decision to walk away from an ongoing case.

I think that the sine qua non of accountability is that it affects and desciplines the decisional process. What we would like to see by the application of the Tunney Act to dismissals is to hold the government's feet to the fire—explain why they have been advocating in court for 13 years that IBM has been violating the Sherman Act and then explain to the public why the head of the Antitrust Division is going to sign a stipulation not simply dismissing the case——

Senator METZENBAUM. That does not answer the question the government raised, and that is the separation of——

Mr. VLADECK. Well, that was the next point I was going to get to.

The government's argument, I think, is fundamentally undermined by a recent Supreme Court Case. Last month the Supreme Court decided in *Young* v. *United States ex rel. Vuitton et Fils* that under certain circumstances where the Federal Government declines to prosecute a case, that the Federal court can step in and appoint a special prosecutor.

The Supreme Court was not particularly split on this case and I think it provides very strong support if this committee wants to consider the possibility of giving a Federal judge the authority in the rare case where, after Tunney Act review has led the court to conclude that the government's attempt to dismiss the case is not in the public interest, to go out and appoint a special prosecutor to continue.

The other point, Senator Metzenbaum, is simply that there may well be instances where it would be appropriate to allow private parties to intervene. Many government cases are quickly followed by private actions. It may be that there are other ways to structure a procedure whereby you can allow the Federal Government to bow out of being a plaintiff, but either through the appointment of a special prosecutor or by allowing private parties to assume that role, allow the case to continue.

Senator METZENBAUM. Mr. Cohen, in your written testimony, you support section 7 of my bill that clarifies that competitors have standing to sue to enjoin an anticompetitive merger and note that its importance is increased by the lax enforcement of our antitrust authorities.

What is the problem caused by the Supreme Court's decision in the *Monfort* cases?

Mr. COHEN. The strange thing is that the decision itself rested primarily on antitrust injury. I am not really quite sure that it is a standing case. The problem is how that case will be picked up, I think, in the distict courts and the courts of appeals. And the way it is going to be picked up is to say if you are a competitor, it is going to be probably impossible for you to show the potential of the kind of injury that you have to show under the antitrust laws, and you are going to get a whole string of decisions as you have in *Monsanto* and *Matsushita,* I think, going far beyond what the Supreme Court actually held in that case.

The problem is, Mr. Chairman, the Supreme Court uses so much imprecise language that it allows district courts who may not be sympathetic to antitrust to do what they want. And I think it is absolutely essential that it be made absolutely clear, in cogent, short, one-paragraph language like you have in your bill, that you have standing if you are a competitor or if you are a takeover target.

Senator METZENBAUM. You talk the fact that you think an empirical study would show that plaintiffs are relatively disadvantaged in antitrust litigation. And I have spoken with some business-people vis-a-vis the question of their bringing antitrust actions.

If you did not have the contingency arrangements and the treble damage aspect, what would you say would be the minimum that a plaintiff might assume it will cost him or her to bring an antitrust action, one of the less controversial, one of the less complicated cases. What do you think—John Jones comes in to see you, and he says, "Well, it is a pretty simple case. I think we have got a pretty good case here." And he says, "I just want to pay you, without any contingency."

Mr. COHEN. They want to pay me? If you find a client like that, I would appreciate it very much.

It does not make that much difference what they pay me because in the view of the Supreme Court dicisions and the court of appeals decisions, in every case you have to start with an economist. And in the average case, just simple economic analysis, you start out with a cost of $75,000 to $100,000.

In terms of the time in the office and the normal——

Senator METZENBAUM. Where does that money go?

Mr. COHEN. That is to do economic studies in order to show what the impact on competition is. As you know, you have got to show the impact on competition in each case; you have got to do these economic studies; you have got to feed things into economic models; you have got to get the econometricians in there with their dummy variables, and they come out and show that there was an impact of so much in the marketplace. That is the beginning.

Now, the attorney fees in an average antitrust case is not complex. Over a period of approximately 2 years, it will run, at our rates, anywhere from $200,000 to $250,000. In other words, we have to be sure that a case is worth at least $1 million in damages and that we have a reasonable chance of winning it before it is economically feasible even to bring that case into the office.

Senator METZENBAUM. What is the standard percentage most plaintiffs' lawyers use in antitrust cases?

Mr. COHEN. I have never heard more than one-third. Some of the negligence lawyers can get 40 percent, the Melvin Belis and people like that. But the more conservative antitrust lawyers have to live with a lesser percentage, from 25 percent to one-third.

Senator **Metzenbaum**. The proponents of claims reduction point to strike suits and whipsaw settlements as reasons for changing the law. As a practical matter, how much does that occur, and what is your response to those claims?

Mr. **Cohen**. Well, my initial response without thinking is the same as my response after due consideration—nonsense.

I have been in most of the major antitrust cases, mostly in a leadership capacity, a member of the executive committee, over the past 10 years, and it is just complete nonsense. In the average antitrust case, you do not have that much leverage. Defendants are not that much worried as they used to be, you know—and even years ago they were not that much worried.

The truth of the matter is, in practically every case you have today, defendants' attorneys have their own contracts, they have their own sharing agreements. They meet together. So no matter whom you settle with or how much it is, it is all going to be shared anyhow.

So I think in today's world, in the real world, that argument has absolutely no validity, and I challenge anyone to show in the last 5 years that any settlement in any major antitrust suit has involved those kinds of factors.

And the truth is, Senator, the average antitrust suit is settled for a fraction of the actual damages that you would ordinarily think you were entitled to. If the overcharge is 10 percent, and you can get a settlement for 2 or 3 percent, given the present state of the law, most plaintiffs' lawyers are going to take it. It is as simple as that.

Senator **Metzenbaum**. Thank you very much, Mr. Cohen.

Thank you, Mr. Vladeck.

This hearing stands adjourned.

[Whereupon, at 11:55 p.m., the subcommittee was adjourned.]

HEARING ON S. 1407, THE ANTITRUST REMEDIES IMPROVEMENT ACT, AND SECTIONS 201-217 OF S. 635, THE INTELLECTUAL PROPERTY REFORM ACT OF 1987

THURSDAY, MARCH 31, 1988

U.S. Senate,
Subcommittee on Antitrust, Monopolies
and Business Rights,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:34 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Also present: Senators DeConcini, Thurmond, Specter, and Humphrey.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator Metzenbaum. The committee will come to order.

It is obvious that antitrust legislation has taken on a greater interest this morning than maybe ever before in my history—since I have been around the U.S. Senate, and certainly since I have been chairman of this subcommittee. I think it is quite obvious that there is a concern as this subcommittee of the Judiciary Committee meets, as to what is happening at the Justice Department.

Many of us are concerned about the Department. The Department of Justice has always been held to a high standard, and a concern that the public may very well and probably has lost confidence in the Department. But beyond that, it is a question, if Mr. Meese does not shortly resign, of whether the public will be losing confidence in government as a whole.

It is no secret about the fact that I opposed the confirmation of Mr. Meese in the first instance, and we went through a hearing on his nomination for about 10 or 11 months. The independent counsel came to the conclusion that he had not violated any laws—certainly, there were no indictable offenses—but made it quite clear that he was not passing on the ethical propriety of Mr. Meese's conduct in the past.

Now, we know we are going through a period where Mr. Meese is actually spending more time before grand juries in connection with his own matters than he is bringing cases to that grand jury.

The resignation of two of his top people, plus four of their assistants, in recent days has created a sense of alarm and consternation through the country. I think it is fair to say that we cannot expect Mr. Rule, who is here today heading up the Antitrust Division of the Department of Justice, to say much about the subject. But I certainly want to give him an opportunity to do so if he wants to.

But I believe very strongly, as we sit here, that the President owes a duty to the country, maybe a much higher duty than that which he owes to his personal friend. That would be to bring about the resignation of Mr. Meese at the earliest possible date. I do not say that in a prejorative way, but, rather, in fact, I think it is a question of respect for law and order in this country.

Having said that, let me address myself briefly to the issues that are before us today. But before doing so, I think maybe out of a sense of courtesy and fairness, before addressing myself to the subject of this hearing, I think that if the ranking member wishes to comment at all in connection with that which I have just spoken about, I certainly would accord him that opportunity to make some comment.

Senator **THURMOND**. Mr. Chairman, I do not have any comment on that at this time. I do not have all the facts. I understand there is a special counsel that has been appointed to look into these matters. The only thing I want to say is that I will not countenance any corruption in any way, shape or form in the Justice Department, or in any other department of this Government. However, I do not think we can try cases here. As I understand it, this matter is in the courts. I think whatever is done has got to be done in the right way.

Now, I see all these televisions here, and I presume they are here because somebody has told them that you or some member of the committee is going into this matter about Mr. Meese. I understood this was an antitrust hearing, and I did not realize it was going to turn into a hearing on Mr. Meese.

If it is going to be a hearing on Mr. Meese, it seems to me it ought to be done at the proper time with proper notice and in the proper way. This is an antitrust hearing.

Now, I think it would be perfectly legitimate to inquire of Mr. Rule if he has the power to speak or ask him maybe if there is anything that he knows in connection with his department. I do not presume he can speak for the whole Justice Department in connection with Mr. Meese.

I think that is about as far as we could go in connection with the Meese matter.

Senator **METZENBAUM**. Before getting into the matter of the hearing itself, pursuant to the suggestion of the ranking minority member, Senator Thurmond, Mr. Rule, if there is any comment you would care to make apropos Mr. Meese and the Department, we will certainly give you the opportunity to do so.

Mr. **RULE**. Thank you, Mr. Chairman.

The only thing that I would say——

Senator **THURMOND**. Speak out so we can hear you now.

Mr. **RULE**. The reason I am here this morning is to testify on various pieces of legislation. I can really only speak for my particular division. I think that in asking the question of how things are running at the Department, one has to look at what is happening in the divisions.

If you look at our division, for example, we are bringing more criminal cases than have ever been brought before, and we just convicted our thousandth Sherman Act felon last week. We have more grand juries sitting than at any time in the history of the Department, in the history of the Division. We have brought more cases in the last 7½ years than were brought in the first 60 years of the Sherman Act—criminal cases.

So we are very active. I have got some very good people who are working very hard. I had some staffing cuts, but I think morale is very high, particularly among our criminal prosecutors. And I think that is evidenced by the very high number of cases that we have brought, the very productive way in which our business has been carried out.

All I can say is that everyone watches and reads the news media to see what is going on, but the business of the country, the business of justice goes on every day. In the Antitrust Division, I can tell you that we are moving ahead. There is much left to be accomplished, and I am there for the duration.

Senator **Metzenbaum**. Mr. Rule, can you tell us whether you know anything personally as to the morale throughout the Department as to what is being said in the Department, what the comments are concerning Mr. Burns' and Mr. Weld's resignations? As I understand it now, the only two top officials that are there are Mr. Meese and Brad Reynolds, whom, as you know, this committee refused to confirm for a higher position.

How is the Department running? In other words, to whom do you look at this point for instructions?

Mr. **Rule**. Well, Mr. Burns, of course, is still there and will be until April 22. I-look to him, and I look to the Attorney General.

Frankly, when I have needed their involvement, their advice, their counsel or their action, I have been able to get it. Now, by and large, most of the divisions have a great deal of autonomy; that is, a great deal of authority is delegated to the Assistant Attorneys General to carry on business. And most of the Assistant Attorneys General are there. They are there. They are doing a good job. They are a good group of people, and they have got a good group of people working for them.

I think the Department of Justice has the finest employees, and I think they are doing as great a job now as they have ever done.

Senator **Metzenbaum**. Senator Specter, I see that you have arrived. We have not made opening statements yet in connection with the pending matter. But because of the pending situation over at the Department, both Senator Thurmond and I very briefly addressed the issues at the Department. I think you have arrived in time to know that we have asked Mr. Rule just a couple of questions. There is no objection if you want to proceed along the same line. If it would be intensive inquiry, I do not think that would be appropriate.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator **Specter**. Well, thank you very much, Mr. Chairman. I have some detailed questions that I want to ask about the proceedings on the concern that professional football may be headed for pay television, a matter on which we had a hearing some time ago. This is an appropriate occasion to get into that. And I have some detailed questions on what is happening with the Koppers Co. on an antitrust matter which involves a possible takeover effort. And I have written the Attorney General just 3 days ago on that.

That would pose an interest on my part to see what Mr. Meese is doing specifically on this kind of case specifically. But I will await my turn on the questioning before getting into these matters.

Senator **Metzenbaum**. Thank you very much.

We will return to the matter for which the committee has originally been scheduled.

We are holding the second hearing of this Congress on antitrust remedies. The hearing concerns two bills: S. 1407, the Antitrust Remedies Improvement Act, a bill I introduced last year; and S. 635, the administration's package of antitrust proposals introduced by Senator Thurmond. Both bills contain many provisions, but this hearing will focus on five of them:

Providing the opportunity for public comment on consent decree modifications and case dismissals;

Clarifying who can sue to stop an illegal merger;

Permitting the Federal Government to recover treble damages for antitrust injuries to the United States itself;

Eliminating treble damages for many types of antitrust violations;

And reducing plaintiffs' damage claims.

Many people may say that these are topics only an antitrust attorney could love, and I would have a hard time rebutting that statement.

Yet we all know that antitrust remedies are the backbone of the antitrust laws. Remedies determine who can bring a suit—who has been harmed and who is entitled to relief. Remedies also establish how much an injured person can recover. If the potential recovery would not even cover injuries and the many costs involved in bringing a suit, no one could afford to bring a case under the antitrust laws. And, finally, remedies are vital to ensuring that there will be adequate deterrence against violating the antitrust laws. If a potential violator only need pay back the damage it caused, there would not be adequate deterrence for violating the law.

The provisions of my bill would strengthen the antitrust laws. On the other hand, most of the administration's proposals would undercut them.

I look forward to hearing the testimony of the distinguished panelists on these important issues today.

Senator Thurmond?

OPENING STATEMENT OF SENATOR STROM THURMOND

Senator **Thurmond**. Thank you, Mr. Chairman.

Mr. Chairman, today the subcommittee continues with its hearings on the various antitrust remedy proposals contained in S. 1407, your bill, and in S. 635, a bill which I introduced. This hearing will focus on five specific proposals in these bills: claims reduction, detrebling, changes to the Tunney Act, treble damages for the United States, and the overruling of the *Monfort* decision.

Mr. Chairman, as I have noted before, the claims reduction proposal in S. 635 is identical to S. 1300, which was reported favorably by the full Judiciary Committee in the last Congress by a vote of 16 to 2. It remedies the serious problems of "whipsaw settlements" and the abusive selection of defendants by plaintiffs. Mr. Chairman, I believe the record on this legislation speaks for itself, and that this bill should be favorably reported by this subcommittee and the full committee.

The issue of detrebling antitrust damages has generated much discussion from antitrust scholars, practitioners, and the business community. It is also relevant to our consideration of treble damages for the United States since there is a strong argument that whatever remedies are available to private parties should also be available to the United States. S. 635 puts both private plaintiffs and the United States on an equal footing but provides treble damages only for the victims of overcharges or underpayments. All other antitrust recoveries would be measured by the actual damages sustained.

Mr. Chairman, our witnesses today should provide some lively debate on the Tunney Act proposals and the standing requirements under the *Monfort* decision. The Tunney Act presently applies to the settlement of Government antitrust suits. There may be many problems, including constitutional issues, with extending these requirements to modifications of consent decrees and dismissals of Government actions. I am looking forward to what our witnesses have to say on this subject.

I might say that I will have to go to the Armed Services Committee but hope to come back soon. I have two committees going on here at the same time, Mr. Chairman, and you know what I am talking about.

Senator **Metzenbaum**. I certainly do.

Senator **Thurmond**. Finally, Mr. Chairman, I want to thank you for holding this hearing. As you may recall, many of the witnesses were unable to attend our last hearing because of previous commitments. I also believe that it is more efficient for us to focus our attention on specific proposals in the two bills, rather than all of the provisions. I look forward to hearing from the witnesses who will be testifying today.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Senator DeConcini?

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator **DeConcini**. Mr. Chairman, thank you.

I would like to commend you for scheduling today's hearing before the Antitrust, Monopolies and Business Rights Subcommittee. The list of witnesses today is distinguished and knowledgeable. I would like to thank all of you for being with us today to help review the different proposals that are before us.

The legislation we have before us today is extremely broad in coverage. S. 1407 seeks to improve both antitrust remedies and enforcement of antitrust laws. Subtitles (A) and (B) of title II of S. 635 address such issues as claims reduction, treble damage reform, and awarding defendants' attorney fees. All of these areas are singularly deserving of very close scrutiny, which I am convinced they will receive here.

Questions have been raised concerning the need for some of the sections of S. 1407. In particular, section 3 awarding treble damages to the Federal Government for antitrust injuries; section 6, extending Tunney Act review requirements to dismissals and judgments modifications; and section 7, granting competitor standing to sue for an injunction for violation of section 7 of the Clayton Act, have caused concern by some.

S. 635 also has its proponents and opponents. It is my hope that by holding these hearings and the hearings last July, many of these questions and controversies will be resolved.

Again, Mr. Chairman, my thanks to you and congratulations for holding these hearings. I look forward to listening to some of the witnesses. Like Senator Thurmond, I have the Intelligence Committee meeting to attend which starts at 10 o'clock this morning. I plan to go there later and will be unable to be here to hear all of this morning's testimony, but will look at the record very closely.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you, Senator DeConcini.

Senator Specter?

Senator **Specter**. Thank you, Mr. Chairman.

I join our colleagues, Senator Metzenbaum, in complimenting you for holding these hearings and for your vigorous approach on the antitrust laws. Today we will be taking up a variety of subjects which are of great importance.

The antitrust laws in the history of our country have been of vital importance in providing the backdrop for competition, which is the hearth of the free enterprise system. And they have to be vigorously enforced. These are especially important in this era where there are so many takeover attempts. As part of the corporate free enterprise system, they are entirely legitimate, but the antitrust implications are one of the principal backdrops for appropriate examination.

One of the matters that I have already indicated an attempt to question about today—and I am very glad to see the Assistant Attorney General here and the chairman of the FTC—is a takeover effort by Beazer, a British company, in collaboration with certain U.S. interests to take over the Koppers Co., a company which has 11,000 employees nationwide, some 3,000 in Pennsylvania with headquarters in Pittsburgh.

And in an era where takeovers are rampant and where there are serious questions as to the appropriateness of that procedure, the antitrust laws have to be very, very vigorously enforced.

We have had a continuing interest on the issue of professional football, as professional football enjoys two unique statuses—stati, the plural of status.

Senator **Metzenbaum**. Let us get our Latin students here.

Senator **Specter**. One is an antitrust exemption, and the second is having the hearts of America. I for one believe that professional football is marching as fast as it can to pay television and expressed my concern about a year ago on what was happening with ESPN and pay football there. And we had a hearing last fall. These hearings are always wonderful because just yesterday afternoon we got an answer to responses from the Justice Department about the antitrust implications there. It is always clear that that is going to be a subject for questioning, and the letter is here. And that is another very important subject.

Within the two bills, Mr. Chairman, there are many matters of great concern. It is a very important subject. I, too, have other committee hearings, but I will try to stay with you as much as possible today because of what I consider to be the great importance of the subject matters we are going to be reviewing.

Thank you very much.

Senator **METZENBAUM**. Thank you.

I now wish to place a statement in the record by Senator Hatch.

[Statement follows:]

STATEMENT OF ORRIN G. HATCH

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES, AND BUSINESS RIGHTS

HEARING ON ANTITRUST REMEDIES

MARCH 31, 1988

MR. CHAIRMAN, I commend you for holding a hearing on the issues involved with the proposed reforms in antitrust remedies. This is an important subject and one that the subcommittee has examined on a number of occasions in recent years. Antitrust remedies are particularly important in that they serve as a powerful deterrent to harmful antiticompetitive activity. Nevertheless, because the punitive aspects of antitrust remedies are so threatening, it is critical that we ensure that antitrust remedies are not being inappropriately utilized by plaintiffs to restrain competition, thereby deterring beneficial as well as antiticompetitive conduct.

A number of important approaches to revision in antitrust remedies are represented in the bills before us this morning. We will examine a proposal that would award treble damages to the government when it is injured by antitrust violations as well a mechanism for resolving the the excessive settlements problem and the so called "whip-saw effect" posed by the conjunction of treble damages exposure and joint and several liability.

I would like to join the chairman in welcoming these witnesses here this morning. We thank you for your analysis of these important legislative efforts.

Senator METZENBAUM. Mr. Rule, we will be very happy to hear from you. And, Mr. Oliver, we are glad to have you with us again. I think you know we have a 5-minute rule, and your entire statement will be included in the record.

STATEMENT OF CHARLES F. RULE, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. RULE. Thank you, Mr. Chairman and members of the subcommittee.

I am pleased to have this opportunity to testify today before this subcommittee on S. 539, S. 635, and S. 1407. I, too, want to commend the chairman and the subcommittee for holding hearings on this legislation.

The hearing today, of course, focuses not on substantive antitrust law, but rather on the equally important issue of antitrust remedies—the other half, if you will, of the antitrust calculus. Substantive law in effect says how people should behave, but applicable remedies determine how they will behave.

I have submitted a rather lengthy statement, even for me, on the various provisions of this bill, and I am sure that it will find its way into the record. As the statement indicates, the Department very strongly supports the remedies proposals in S. 539 and S. 635. Those provisions are entitled the "Antitrust Equal Enforcement Act of 1987" and the "Antitrust Remedies Improvements Act of 1987." Let me first turn to the Antitrust Equal Enforcement Act, or what is commonly referred to as claims reduction.

When plaintiffs settle with some but not all defendants, if this legislation becomes law, the remaining claim would be reduced by the fair share of damages attributable to the settling defendants, not simply by the amount of the settlement. As Senator Thurmond pointed out, this bill will eliminate what has become a familiar tactic to those in the antitrust bar of using joint and several liability under the antitrust laws as a whipsaw to try to get sweetheart early deals with some defendants, and then increase the pressure on other defendants to settle by upping the ante of their potential liability. This bill, by eliminating that threat, is very important and well worth a quick passage.

Moreover, we believe that the claims reduction proposal in these bills will not have any effect, really, any adverse effect on deterrence. The full appropriate deterrence level of the antitrust damage provisions will remain.

Of course, the claims reduction proposal in S. 539 and S. 635 is identical to S. 1800, which passed overwhelmingly in the committee the last Congress. It has been fully considered, and I would urge quick passage during this Congress of this very important piece of legislation.

Let me turn next to the Antitrust Remedies Improvements Act, which is in the two bills, sometimes referred to as detrebling. It also, though, would provide treble damages for the Government and defendants' attorneys' fees. We feel that this provision is extremely important.

Under the bill, treble damages—which are, as you know, automatically recoverable today whenever there is an antitrust violation—would only be recoverable by plaintiffs who have suffered antitrust injury as a result of overcharges or underpayments. All others would be entitled to actual damages plus interest.

This, in my opinion, is the single most important antitrust legislative issue that needs to be considered. Automatic treble damages is clearly the most anachronistic and potentially mischieveous aspect of antitrust. Clearly, some aspects of antitrust damages should be a multiple of actual damages. On the other hand, in some cases trebling does have adverse effects, and I believe those are well documented. And you do not have to take it from me or even from simply those in the Republican Party or in the administration. I note that a recent interview by Professor Pitofsky indicated that he felt that reforming treble damages was extremely important. So I think that the support for this sort of proposal runs across the spectrum.

We believe that our proposal is fair and maintains adequate deterrence and really is the best solution to the treble damage issue. Consumers get three times their damages; competitors get actual damages plus prejudgment interest. It reduces the incentive to abuse antitrust laws to frustrate competition, while maintaining strong deterrence for covert antitrust violations that do nothing but harm consumers.

However, something must, and I believe will, be done. It may not be this bill; it may be some other bill. And it may not be this week; it may not be this year. But it will be done eventually. I think this is a great opportunity for this committee to show its historic leadership in antitrust and pass a very important reform, rather than waiting until some particularly egregious case requires immediate action.

Let me briefly also mention that we are very supportive of the provision of this bill and also of S. 1407 that would, in effect, for the first time allow the Federal Government to recover treble damages. The Federal Government is usually victimized by overcharges and underpayments. So under our bill, under the administration bill, the Federal Government generally would get treble damages. Now we are only entitled to actual damages. We have increasingly been finding bid-rigging and antitrust violations with respect to Government procurement. We need increased deterrence in that area. We need to be able to protect the Treasury more effectively than we can now. And I think that if we pass S. 539 or S. 635, or some treble-damage-for-the-Government proposal, that will be very helpful to the Treasury and to deterring bid-rigging, price-fixing on Government procurement.

As for S. 1407, as my statement points out, we believe that except for the treble damages for the Federal Government, that bill is largely unnecessary and, in some circumstances, may actually be counterproductive and harm competition. For that reason, we cannot support the other provisions of S. 1407.

With that, Mr. Chairman, let me stop and once against commend the subcommittee for considering these issues and offer to work very closely with the committee and the staff to try to develop some of these important reforms. And, obviously, I will be happy to answer any questions that you might have.

[The prepared statement of Mr. Rule follows:]

U.S. Department of Justice

DRAFT

3/28/88 (To OMB)

Washington, D.C. 20530

STATEMENT OF

CHARLES F. RULE
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BEFORE

THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 539, S. 635. and S. 1407

ANTITRUST REMEDIES

ON

MARCH 31, 1988

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to appear before the Subcommittee to testify on S. 539, and S. 635 and S. 1407. 1/ These bills deal not with substantive antitrust law, but rather with the equally important issue of appropriate antitrust remedies. Businessmen and women, lawyers, economists, and of course the Members of this Subcommittee well know the significance of remedies in antitrust or indeed any legal system. Substantive law says how people should behave; but applicable remedies determine how they will behave.

We have three kinds of antitrust remedies. Criminal prosecution is designed solely to punish and deter intentional violations. Since about 1960, and particularly in the last 10 years or so, the indictment and incarceration of individuals responsible for hard-core antitrust violations has played an extremely important remedial role in antitrust. The Department of Justice intends to see this role increased even more. We

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1/ The antitrust remedies improvements proposals contained in S. 539--the Administration's omnibus "Trade, Employment, and Productivity Act of 1987"--and S. 635 are identical. They consist of the "Antitrust Equal Enforcement Act of 1987," sections 4102-04 of S. 539 and sections 201-04 of S. 635, and the "Antitrust Remedies Improvements Act of 1987," sections 4111-17 of S. 539 and sections 211-17 of S. 635. S. 1407 is coincidentally entitled the "Antitrust Remedies Improvement Act of 1987."

also have preventive antitrust remedies: either the federal government or a private party threatened with antitrust injury may seek to enjoin a violation before it occurs. Finally, we have compensatory remedies: private parties, the federal government, and state attorneys general as parens patriae all may sue to recover monetary damages for injuries caused by antitrust violations. All of these remedies act together to influence the behavior of those who may be accused of antitrust violations as well as those who may be doing the accusing.

Such a panoply of remedies is by no means unique to antitrust. Antitrust is somewhat unusual, however, in that significant punitive, deterrent aspects were deliberately added to its basic compensatory remedies. With a few, recently-enacted exceptions, antitrust damages are always trebled, and plaintiffs automatically are awarded attorneys' fees if they prevail. These punitive features simultaneously give potential plaintiffs strong positive incentives, and potential defendants strong negative incentives, that ordinary compensatory remedies do not. In short, we ask our compensatory antitrust remedies to do a lot of things at the same time, and each of them--compensation, punishment, and deterrence--must be done correctly. After 90 years, there is good reason to believe that some adjustments are necessary.

For some time now, and increasingly in the past few years, the antitrust community generally and this Committee in particular have been studying and working with the antitrust damage remedies to see that they continue to provide fair compensation, deter potential defendants from doing what ought to be deterred, and give potential plaintiffs appropriate incentives to challenge what ought to be challenged. The Committee has recognized that not all antitrust violations are clear, and that the punitive aspects of our damage remedies can deter beneficial as well as anticompetitive activities. The Committee also has noted that the private interests of potential plaintiffs do not always coincide with those of the public, and that punitive damages can sometimes give plaintiffs an incentive to challenge procompetitive behavior.

Three times in the last 6 years, the Committee and the Congress have responded to these concerns by adjusting antitrust damage rules for specific types of cases. The Export Trading Company Act of 1982, 2/ the National Cooperative Research Act of 1984, 3/ and the Local Government Antitrust Act of 1984 4/ all recognized the continuing care that must be

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2/ Pub. L. No. 97-290, 96 Stat. 1233.

3/ Pub. L. No. 98-462, 98 Stat. 1815.

4/ Pub. L. No. 98-544, 98 Stat. 2750.

taken with a compensatory remedy that also performs a punitive, deterrent function, and accordingly in all three statutes Congress detrebled, or in one instance eliminated, antitrust damage recoveries. The question whether to adjust antitrust damage rules generally is thus a matter of proper focus for the Subcommittee during this Congress. An important part of this effort involves awarding treble damages to the government when it is injured by antitrust violations.

Also before the Subcommittee are current antitrust rules concerning who must pay what proportion of an antitrust judgment. The Judiciary Committee has developed an extensive record on the need to modify the rules that determine the manner in which joint and several liability for antitrust damages is apportioned among the responsible parties. We believe that it is now time to act on this record.

Other proposals in S. 1407 deal with a new, federal "parens patriae" damage remedy, procedures in government antitrust enforcement actions, including particularly merger cases involving divestiture, and the standing of competitors to challenge mergers. Many of these proposals would affect directly and substantially the Department's day-to-day activities. I hope our analysis of them will be helpful to the Subcommittee.

S.539 AND S. 635

Let me turn first to the Administration's antitrust remedies proposals contained in S. 539 and S. 635. These proposals--the Antitrust Equal Enforcement Act of 1987 and the Antitrust Remedies Improvements Act of 1987 5/--would make several timely adjustments, principally to our antitrust damage remedies, each closely related to the others. All are intended to function together to preserve and indeed to enhance a strong deterrent effect on unambiguously harmful conduct while removing undue inhibitions on potentially procompetitive activities. All continue to give potential antitrust plaintiffs appropriate incentives to challenge anticompetitive activities, while discouraging plaintiffs from using antitrust damage remedies to restrain competition.

Briefly, the "Antitrust Equal Enforcement Act of 1987" provides a right of claim reduction to counter "whipsaw" settlement tactics that can be used to undermine the just resolution of antitrust cases. Today, a plaintiff's trebled claim against non-settling defendants is reduced only by the actual amount it receives from any settling defendants. This

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5/ As noted above, the Administration's proposed Antitrust Remedies Improvements Act of 1987 coincidentally carries the same name as S. 1407. The two proposals deal with entirely different subject matter, however.

bill would reduce the plaintiff's recovery by at least the share of its damages fairly allocable to each person that the plaintiff releases from liability. The formula for determining a fair share would be based either on sales, as in the typical price-fixing case, or on relative responsibility and benefit in other cases.

The Administration's "Antitrust Remedies Improvements Act of 1987" correlates the trebling of antitrust damages to the type of injury caused by an antitrust violation. Under the bill, private plaintiffs, state attorneys general suing on behalf of consumers, and for the first time the United States as civil plaintiff, would recover treble damages for injuries due to overcharges or underpayments by an antitrust violator. Plaintiffs seeking to recover their profits lost as the result of an antitrust violation would be entitled to actual damages plus prejudgment interest on their actual damages from the date of the injury. All successful plaintiffs, of course, would continue to recover their costs, including reasonable attorneys' fees. The Antitrust Remedies Improvements Act also would provide attorneys' fees to prevailing defendants where private plaintiffs' conduct was "frivolous, unreasonable, without foundation, or in bad faith."

With the Subcommittee's permission, I would like to discuss each of these proposals in somewhat more detail.

CLAIM REDUCTION

The Antitrust Equal Enforcement Act addresses the issue of how best to distribute the responsibility for damages among the defendants in antitrust litigation in order to reduce perceived unfairness resulting from the current antitrust damage allocation system. The issue of antitrust damage allocation reform is, of course, a familiar one for this Subcommittee. Proposals to amend the current scheme of allocating damage responsibility in antitrust litigation have been before the Judiciary Committee continuously since 1979. [6] The Committee has held several sets of hearings on the issue and three times has reported legislation that would have provided rights of contribution or claim reduction in antitrust litigation. [7] Just last Congress, the Committee overwhelmingly and in a bipartisan manner favorably reported S. 1300, a claim reduction bill that enjoyed the support of the Administration and the business community in addition to that of the Committee. In view of this longstanding record of broad support for such legislation, and the fact that the Antitrust Equal Enforcement

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[6] See S. 1468, 96th Cong., 1st Sess. (1979); S. 995, 97th Cong., 1st Sess. (1981); S. 380, 98th Cong., 1st Sess. (1983); S. 1300, 99th Cong., 1st Sess. (1985).

[7] S. Rep. No. 428, 96th Cong., 1st. Sess. (1979); S. Rep. No. 359, 97th Cong., 2d Sess. (1982); S. Rep. No. 320, 99th Cong., 2d Sess. (1986).

Act is identical to S. 1300 as reported by the Committee last Congress, we urge its expedited consideration.

The need for damage allocation reform has been persuasively demonstrated during the hearings held by the Committee over the last 9 years. Liability for antitrust damages is joint and several, which means that a plaintiff may sue any or all of the members of an antitrust conspiracy and collect its damages in any proportion from liable defendants. Furthermore, when a plaintiff releases a defendant from liability for damages, only the actual amount paid for the release is deducted from the plaintiff's claim against the remaining defendants. Thus, if a plaintiff enters into a settlement with any defendant for an amount that is less than the share of the plaintiff's injury caused by the settling defendant's own conduct, responsibility for the difference is shifted to the remaining defendants. The term "whipsaw" settlements has come to be applied to the deliberate use of early, "sweetheart" settlements to raise the perceived liability of nonsettling defendants to the point where they are forced to abandon even meritorious defenses and settle out of the fear of facing ruinous liability should they litigate and lose.

The extent to which either strategic defendant selection or whipsaw settlements have resulted in unfairness warranting reform, and what manner of reform would be most appropriate, have been debated at length. Although legal scholars have failed to reach a consensus on these questions, 8/ I believe that the exhaustive hearing record that has been developed before this Committee provides a firm basis for congressional action at this time.

After examining the record on antitrust damage allocation, we are convinced that there is a real problem to be solved. That problem is the use or potential use of whipsaw settlements. Plaintiffs have an obvious incentive to obtain the maximum amount they can in settlements, and the current antitrust damage allocation system encourages this incentive to the point of excess by permitting whipsaw settlements. Antitrust liability rules should encourage fair settlements, but not whipsaw settlements.

8/ See, e.g., Easterbrook, Landes, and Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980) (costs of contribution and claim reduction probably exceed benefits); Polinsky and Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981) (claim reduction recommended over contribution and over no change in existing law); Sullivan, New Perspectives in Antitrust Litigation: Towards a Right of Comparative Contribution, 1980 U. Ill. L. F. 389 (contribution should be provided in non-per se cases only on a discretionary, comparative fault basis).

Three types of reform legislation in this area have been considered by the Committee: contribution, claim reduction, and the elimination of joint and several treble-damage liability. Contribution permits liable defendants who have paid more than their fair shares of the plaintiff's damages to sue other liable defendants who have not. Basically, such a reform addresses the perceived unfairness that results when plaintiffs make arbitrary choices to sue or collect damages from some but not all of those responsible for antitrust injury. On the other hand, claim reduction requires automatic deduction from the plaintiff's remaining claim of the fair share of its damages attributable to any person released by the plaintiff from liability. Consequently, that reform directly addresses the whipsaw settlement problem itself. Individual treble-damage liability (i.e., the elimination of joint and several liability) eliminates both of these problems--and more.

Over the last few years, the Department of Justice has listened to the debate on these approaches and studied their relative effects on antitrust damage litigation. Of particular concern to the Department is the relative effect that each alternative would have on deterrence of hard-core criminal behavior, such as price fixing, and on plaintiffs' incentives to discover and to bring suit against it.

Deterrence depends upon a person's perception of his or her expected liability from committing an offense as well as the variability of that liability (the range between the lowest and highest possible penalty). As expected liability and variability increase, so too does the deterrent effect on risk averse firms.

Eliminating joint and several liability would reduce the probability that a violation would be detected and pursued through damage actions by reducing the expected recoveries of potential plaintiffs. With individual treble-damage liability, plaintiffs would have to name and successfully collect damages from each person liable for their injury, and bear increased litigation costs if they lose. Given a reduction in expected recoveries, potential plaintiffs' incentives to detect and prosecute violations would decrease.

For basically the same reasons that eliminating joint and several liability would dampen plaintiffs' incentives to detect and pursue violations, it would also, and to the same extent, reduce defendants' expected liability *ex ante* (i.e., before engaging in unlawful conduct). Eliminating joint and several liability also clearly would reduce the variability of liability, since a single firm could no longer be potentially liable for the entire amount of plaintiffs' damages. If firms are risk averse, as virtually all economists believe, then this would further reduce deterrence.

Providing a right of contribution would not produce the same reduction with regard to probability of detection that eliminating joint and several liability would produce, since plaintiffs would remain free to sue any defendant or combination of defendants for the entire amount of their damages. It would, however, produce similar reductions in defendants' perceive liability ex ante and in the variability of their liability to the extent that they were able to redistribute their damage liability through actions for contribution. The only difference between eliminating joint and several liability and providing for a right of contribution with respect to defendants' perceived laibility would be the costs incurred by defendants in pursuing their contribution rights, but these could be minimized if defendants were able to enter into damage-sharing agreements prior to litigation.

Claim reduction would not reduce deterrence to the same extent as eliminating joint and several liability. Claim reduction would not prevent a plaintiff from recovering all of its damages from any one defendant. It could require the plaintiff to litigate over the assignment of liability among defendants, but only in cases in which the plaintiff is unable to reach a global settlement. Claim reduction does eliminate the possibility of a defendant's actual, out-of-pocket liability being magnified by sweetheart settlements. As a result, claim reduction would reduce the variability of liability, but not to the same extent as eliminating joint and several liability or even providing a right of contribution. Thus, claim reduction would have a lesser effect on deterrence than eliminating joint and several liability or granting a right of contribution, while substantially eliminating whipsaw possibilities.

To summarize, the Department believes that the record developed through congressional hearings on the antitrust damage allocation system has disclosed a problem with whipsaw settlements, and that the claim reduction proposal provided in S. 539 and S. 635 is an appropriate method for resolving this problem. Claim reduction would have less likelihood of reducing deterrence of inherently anticompetitive business behavior than would eliminating joint and several liability or providing a right of contribution. The Antitrust Equal Enforcement Act is identical to S. 1300, as broadly supported and favorably reported last Congress by the Judiciary Committee. I urge the Subcommittee promptly to report once again this legislation so that it can finally be enacted this Congress.

TREBLE DAMAGES AND PREJUDGMENT INTEREST

The treble damage remedy is an important element in antitrust enforcement. Public enforcement alone is not sufficient to detect and prosecute all violations. Private actions have served to help deter and redress antitrust violations since the Sherman Act was passed in 1890.

The Administration's Antitrust Remedies Improvements Act, contained in S. 539 and S. 635, would preserve, and in fact enhance, the effectiveness of this important remedy. Antitrust violators that harm consumers by raising the cost of goods and services would continue to face automatic treble damage liability. For the first time, such violators would also risk treble damage actions when the United States is the victim of their violations. Such clearly anticompetitive conduct as price fixing and bid rigging for government contracts is costing the taxpayers dearly. We have about 35 grand juries investigating such conduct right now. But so long as the United States is unable to recover punitive treble damages, we cannot hope to protect the taxpayers adequately. The need for a stronger deterrent to such practices is clear.

The Administration's Antitrust Remedies Improvements Act would also recognize, however, that universal treble damages can deter a wide range of conduct that is not clearly anticompetitive and that may be quite beneficial to consumers and to our economy generally. The current punitive damage provisions apply uniformly to all types of practices that may, in particular circumstances, be found to violate the antitrust laws--no matter how close the question and no matter how likely the violation is to be detected. In so doing, treble damages likely inhibit some procompetitive activities. The proposed legislation selectively eliminates the punitive portion of damages assessed against activities that are often procompetitive. As a result, it reflects the fact that it simply makes no legal or economic sense for a punitive remedy *designed strongly to deter clearly harmful conduct like price* fixing to be applied equally to ordinary, open business activities that, after a full trial on their economic effects, may or may not be found to have been anticompetitive.

The logical shortcomings of the current treble-damage rule have long been recognized. Congress has considered proposals to limit the application of treble damages since at least the 1950s, when a bill was introduced to make multiple damages discretionary. In recent years, calls for one partial reform or another have been constant.

In fact, Congress has on two recent occasions enacted legislation that limits antitrust damage recovery to full compensation--actual damages plus prejudgment interest--for certain categories of conduct found to hold substantial procompetitive promise. The Export Trading Company Act of 1982 responded to concerns that treble-damage liability and uncertainty over the application of the antitrust laws to export activities were combining to constrain American export trade. The National Cooperative Research Act of 1984 reflected the same concerns as they relate to joint research and development. This Committee found that the threat of private litigation and the uncertain legal status of joint R&D efforts "may have caused many firms to abandon their plans for such efforts at the drawing board, even when the activities under consideration posed little or no actual threat to competition." 9/

In addition to these two statutes, Congress recently enacted the Local Government Antitrust Act of 1984 which eliminated damage recovery altogether in antitrust suits challenging activity by local government entities. Once again, this Committee found that "[t]he threat of antitrust treble damage actions has caused local officials to avoid decisions

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9/ S. Rep. No. 427, 98th Cong., 2d Sess. 3 (1984).

that may touch on the antitrust laws even when such decisions have involved critical public services." 10/

It is time to take what we have learned from the extensive and lengthy debate over the treble-damage remedy and address the problem on a broader basis. Years of court decisions, scholarly comment, commissions to study the antitrust laws, congressional hearings, and limited revisions of the law have provided the experience and guidance to fit the remedy to its proper task.

We believe that the primary goals in reforming the treble-damage remedy should be to maintain the strongest incentive for plaintiffs to sue defendants who engage in patently anticompetitive conduct, thereby punishing and deterring such conduct. It should also provide a fully compensatory remedy for conduct which may or may not be anticompetitive under the circumstances, so as not to allow the threat of punitive damages to inhibit innovative competitive activity. These goals can be sought in several ways; indeed, a number of alternative approaches have been suggested. While there is no absolutely perfect approach, the Administration's

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10/ S. Rep. No. 593, 98th Cong., 2d Sess. 3 (1984).

Antitrust Remedies Improvements Act provides what we think is the best way in which to define the proper scope for punitive damages in antitrust. Under the Act, treble damages will continue to be recoverable for injuries in the form of overcharges or underpayments by an antitrust violator. Other antitrust injuries--plaintiffs' lost business profits--will be redressed by actual damages plus prejudgment interest, unless the award of all or part of such interest is unjust in the circumstances. We believe that this approach has a number of significant advantages.

The Administration's proposal maintains a strong incentive for plaintiffs to detect and challenge unambiguously anticompetitive behavior but minimizes the incentive to bring suits intended to thwart competition. Persons claiming antitrust injury due to overcharges typically are consumers who are hurt by anticompetitive practices such as price fixing, bid rigging, division of markets, and allocation of customers. Such plaintiffs are motivated by a desire to promote competition from which they, as customers, will benefit. Rivals seeking lost profits, however, may be suffering from an inability to compete effectively in the marketplace rather than from any unlawful practice. The law should not provide them with an enhanced ability or incentive to challenge healthy, aggressive competition that is usually unconcealed; by making the punitive element out of suits by rivals, the Administration's proposal accomplishes this result.

At the same time, the Administration's proposal recognizes that some of the practices challenged by competitors will, in certain instances, prove to be actually anticompetitive. For these instances it preserves a fully sufficient incentive to competitors who have actually been harmed by an antitrust violation to seek redress: a fully compensatory remedy, which means actual damages and interest thereon from the time they are injured to the time they collect their damages plus attorneys' fees, nothing less. The proposal provides for prejudgment interest because actual damages alone do not compensate for the lost use of money from the time of injury to the time of judgment.

The issue of prejudgment interest has been studied several times in the last few years. In 1980, Congress enacted a limited right to recover prejudgment interest on the basis of dilatory conduct in treble damage actions. 11/ The Administration's Antitrust Remedies Improvements Act preserves this right in cases in which damages will continue to be

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11/ Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 4, 94 Stat. 1154, 1156.

trebled. When damages have recently been detrebled in particular contexts, however, it has been recognized that prejudgment interest should be awarded as a matter of course. The Act follows the lead of the National Cooperative Research Act of 1984 in awarding prejudgment interest on actual damages from the date of injury, unless all or part of such interest would be unjust in the circumstances. 12/

The Administration's proposal for overall treble-damage reform provides certainty and can be implemented easily. Its determination of when multiple damages are recoverable turns on an element of proof already required in every case: the plaintiff's damage theory. By contrast, alternative proposals to detreble for certain categories of conduct would engender lengthy litigation over the appropriate characterization of the offense charged. Indeed, the number of Supreme Court cases on the question whether particular conduct should be treated as "per se" unlawful or instead subject to the "rule of reason" is a stark reminder of the need for a distinction that is not easily manipulated in order to turn actual-damage cases into punitive-damage cases. Nor will an enumeration of particular

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12/ The Administration's proposal differs only slightly from the NCRA prejudgment interest formula by giving the court more flexibility in choosing the appropriate interest rate to best reflect a loss over a period of fluctuating rates.

types of violations suitable for one treatment or another prove stable. If counsel can mischaracterize conduct in order to raise the stakes of litigation they will do so; for example, joint purchasing arrangements may be called boycotts or joint selling arrangements may be characterized as price fixing. It is much more difficult, however, to mischaracterize lost profits as overcharges. The pre-litigation relationship between the parties immutably determines the plaintiff's damage theory: if it was not a consumer of the relevant product, it could not be overcharged for it. Thus, the Administration's proposal avoids the potential for abuse that conduct-oriented approaches to detrebling may create.

This is not to say, of course, that statutes like the National Cooperative Research Act and the Administration's proposal to extend that Act to cover joint production ventures, or proposals to limit damages in intellectual property licensing cases to actual damages, are not worthwhile. Particularly as long as a general, treble-damage remedy remains in place, actual-damage treatment for identified, potentially procompetitive behavior may be appropriate. The Administration's proposed damage-theory approach is a most attractive one for general treble-damage remedy reform, however.

The remedies provided by the Administration's Antitrust Remedies Improvements Act are also consistent with optimal penalty theory. Overcharges clearly indicate the societal harm caused by an antitrust violation. Lost profits are not closely related to such harm, however, and in fact may well overstate it. Overcharges also typically result from covert behavior that is difficult to detect; treble damages provide a needed multiplier to deter such violations.

Finally, the Act promotes consumer welfare. Provable overcharges reflect the transfer of surplus from buyers to sellers that monopoly permits and competition prevents. When overcharges are proven, trebled, and recovered, we have the greatest confidence that the antitrust laws are being applied in line with their intended function, the preservation of a competitive economy.

ATTORNEYS' FEES

Let me turn briefly now to those provisions in the Administration's proposal that deal with attorneys' fees in private antitrust cases. The bill provides for the award of costs, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff has pursued baseless litigation. This provision addresses concerns that the current imbalance in antitrust law regarding the award of attorneys' fees facilitates the potential abuse of antitrust remedies.

Sections 4 and 16 of the Clayton Act entitle only prevailing plaintiffs to attorneys' fees; in general, prevailing defendants do not receive attorneys' fees. Thus, the antitrust laws embody both the English and American rules on attorneys' fees, but in a manner that discriminates between plaintiffs and defendants.

This statutory imbalance was knowing and deliberate. Private enforcement of the antitrust laws is an important complement to government prosecution. Antitrust cases can be legally or factually complex, and Congress decided to supplement treble-damage recovery with the award of attorneys' fees to provide even greater incentives to potential plaintiffs. Unfortunately, the attorneys' fees imbalance also creates a potential for abuse. This abuse may take the form of a "strike suit" filed primarily to extract a settlement from a defendant for something less than the defendant's anticipated litigation costs. The abuse may also take the form of a potentially lengthy injunctive suit by a rival to convince a competitor to abandon its plans to compete aggressively rather than incur substantial legal costs. Such actions undermine the purposes of private enforcement and increase the costs that litigation imposes on society generally.

The Administration's Antitrust Remedies Improvements Act recognizes the possibility of such abuse by awarding costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith." This standard is most familiar to the Members of this Subcommittee: it is the same standard used by Congress when it decided to award attorneys' fees to prevailing defendants in the National Cooperative Research Act of 1984.

Indeed, Congress has on more than one recent occasion recognized and responded to the potential for abuse of the antitrust process by creating the possibility of attorneys' fees awards to prevailing defendants in such circumstances. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 13/ permits recovery of attorneys' fees by a prevailing defendant in a state parens patriae case upon a showing that the suit was brought "in bad faith, vexatiously, wantonly, or for oppressive reasons." 14/ The Export Trading Company Act of 1982 awards attorneys' fees to prevailing defendants as a matter of course. 15/ And as indicated above, in its most recent

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13/ Pub. L. No. 94-435, 90 Stat. 1383.

14/ 15 U.S.C. 15c(d)(2).

15/ 15 U.S.C. 4016(b)(4).

consideration of this issue in the National Cooperative Research Act, Congress decided to permit recovery of attorneys' fees by a prevailing defendant in cases challenging joint research and development upon a showing that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith. 16/ In reporting this standard, based on the Supreme Court's Christiansburg Garment decision, 17/ the NCRA conferees expressed their belief that it would "achieve the desired goal of protecting law-abiding defendants from baseless and bad faith attacks while ensuring that private enforcement of the antitrust laws is not deterred." 18/ We concur in this assessment, and recommend that this carefully drawn provision be made applicable across-the-board in private antitrust cases.

To summarize Mr. Chairman, the Department believes that the antitrust remedies proposals in S. 539 and S. 635 represent timely improvements in the way in which those remedies complement substantive antitrust law to benefit consumers. I hope the Subcommittee will consider them favorably.

16/ 15 U.S.C. 4304(a)(2).

17/ Christiansburg Garment v. EEOC, 434 U.S. 412 (1978).

18/ H.R. Rep. No. 1044, 98th Cong., 2d Sess. 15 (1984).

S. 1407

Let me now turn to the antitrust remedies proposals contained in S. 1407.

TREBLE DAMAGES FOR THE UNITED STATES

Let me begin my discussion of S. 1407 with the one proposal that the Administration can support without reservation: treble damages for the United States. Section 3 of S. 1407 would amend section 4A of the Clayton Act (15 U.S.C. 15a) to permit the United States to recover treble damages when injured by antitrust violations. This proposal is similar to a proposal of the Administration in the Antitrust Remedies Improvements Act contained in S. 539 and S. 635. We have sought such legislation as part of the broader revision of antitrust damage remedies that the Administration's antitrust reform package would provide because of our view that the current, actual damage remedy in section 4A is insufficient to deter antitrust violations directed against the United States.

As part of an overall treble damage reform proposal, the Administration's bill would limit the recovery of treble damages by the United States to injuries caused by overcharges or underpayments, and provide actual damages plus prejudgment interest whenever the United States suffered some other type of antitrust injury. Section 3 of S. 1407, on the other hand, would treble damages in _all_ section 4A cases, regardless of the nature of the government's injury. In practice this distinction is not likely to be significant, as most, if not all, section 4A cases would be based on overcharges or underpayments.

It bears repeating that the distinction between the treble damages recoverable in private antitrust cases brought under section 4 of the Clayton Act and the actual damages recoverable in cases brought on behalf of the government under section 4A is unjustifiable. In fact, the law encourages antitrust conspiracies directed at the U.S. Treasury: the chances of such conspiracies ultimately being more profitable are simply much greater. In light of the many, many, bid-rigging conspiracies affecting government procurement that we have been uncovering over the last decade, I urge the Congress expeditiously to remedy this situation without regard to whatever other action is taken on the remaining remedies-reform proposals contained in S. 539, S. 635, or S. 1407.

REDRESS FOR CONSUMERS

Section 2 of S. 1407 would amend section 4C of the Clayton Act (15 U.S.C. 15c) to permit _parens patriae_ suits on behalf of consumers by federal antitrust enforcement entities as well as state attorneys general. Specifically, the bill would authorize the United States Attorney General and the Federal Trade Commission to bring damage actions for violations of the Sherman Act on behalf of all natural persons residing in the U.S. who are injured by such violations. Currently, section 4C permits such suits by state attorneys general on behalf of the residents of their states.

Under current law, a person injured by reason of an antitrust violation may obtain redress by a number of alternative methods. First, a private action for treble damages may be brought under section 4 of the Clayton Act by such a person on his or her own behalf. Second, where a number of persons have been injured by a violation, perhaps with no one of them suffering injuries so large as to warrant the risks of a costly court action, a class action on behalf of all them may be brought, again under section 4 of the Clayton Act. Third, where a class action may be untenable, state attorneys general may bring actions for treble damages on behalf of all natural persons residing in their states who have been injured in their property.

Damage actions by or on behalf of persons injured by violations are a most important element in maintaining adherence to the antitrust laws. Such actions promote deterrence of clear-cut violations by posing the threat that the violator will suffer losses rather than profits from such conduct. They also ensure that our laws are fair by providing for compensation to those who are injured by antitrust violations.

Section 4C of the Clayton Act was made law in 1976 as part of the Hart-Scott-Rodino Antitrust Improvements Act in order to make the damage action a fully effective remedy. It was feared that the notice and manageability requirements of class actions and the high costs and risks of antitrust litigation relative to the size of typical consumer injuries had effectively denied consumers a remedy for antitrust injuries. Congress dealt with that concern by restoring the common law power of the states to bring actions as parens patriae on behalf of their citizens.

Section 2 of S. 1407 seeks to reinforce this remedy by authorizing the federal antitrust enforcement agencies to recover damages on behalf of all U.S. consumers injured by a violation of the Sherman Act. It is not clear, however, that such reinforcement is necessary or desirable. In reporting the original parens bill, this Committee observed that a state attorney general is an "effective and ideal spokesman for the public in antitrust cases." 19/ In the ten years since the parens patriae remedy was enacted, state antitrust activity has increased greatly. Consumers likely have benefited from having their antitrust damage concerns addressed by those best able to identify and respond to them.

State attorneys general, being closer to their citizens injured by antitrust violations, have a greater incentive to bring consumer-based damage actions than would the federal government. State attorneys general have been steadily accumulating the expertise needed successfully to pursue complex antitrust damages actions, and are free to hire outside counsel when additional assistance is required. Furthermore, the state attorneys general have shown in several instances that, by coordinating their efforts, they can pursue antitrust actions of multi-state scope 20/ that approach the limits on the size of such consumer damage actions that successfully can be litigated.

19/ S. Rep. No. 803, 94th Cong., 2d Sess. 39 n.1 (1976).

20/ See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 497 F. Supp. 218 (C.D. Cal. 1980)(Arizona, California, Florida, Oregon, and Washington); In re Mid-Atlantic Toyota Antitrust Litigation, 525 F. Supp. 1265 (D. Md. 1981)(Maryland, Delaware, West Virginia, District of Columbia, and Pennsylvania), aff'd sub nom., Pennsylvania v. Mid-Atlantic Toyota Distrib., Inc., 704 F.2d 125 (4th Cir. 1983).

The federal antitrust authorities are best suited to bringing criminal and civil-injuctive enforcement actions and seeking damages on behalf of the United States. The investigatory powers and substantive expertise of the Department of Justice allow us to cut off violations that exact high costs from our economy and undermine our competitiveness. Aided by grand jury authority, we are able to conduct criminal prosecutions that, with appropriate sentencing, are a particularly effective deterrent to violations of the antitrust laws.

Moreover, federal enforcement efforts make an important contribution to the recovery of damages in private actions and in parens actions brought by state attorneys general. Burdens on plaintiffs in damage actions can be reduced by the prima facie effect of judgments and decrees achieved in government enforcement actions and, since Congress so provided in 1980, by the doctrine of collateral estoppel. As a result, plaintiffs' damage cases often center on the issues of injury and amount of damage, issues on which federal enforcers possess no special expertise.

With respect to such damage issues, the type of nationwide parens cases contemplated by S. 1407 would be extremely difficult to manage. Making realistic determinations regarding the amount of damages suffered by consumers across the country would be inordinately complicated in many instances. By contrast, state parens cases of a more limited geographic scope are more likely to find consumers similarly damaged by the antitrust violations being challenged.

Finally, the problem of federal preemption of state parens actions would have to be addressed in enacting legislation along the lines of S. 1407. Would the filing of a federal parens action automatically preempt previously filed state parens actions? Should a state be allowed to opt out of a federal parens action on behalf of its consumers? Such questions, involving as they do basic federalism concerns, are by no means easy to resolve.

The current system appears to take maximum advantage of limited federal resources: violations are most effectively halted, extensive investigatory powers are best used, and private injury is redressed by those best able to evaluate and respond to it. The additional remedy of parens patriae suits brought by the federal antitrust enforcement authorities does not appear to be warranted.

NEW SUBSTANTIVE AND PROCEDURAL REQUIREMENTS REGARDING DIVESTITURE

Section 4 of S. 1407 would make a number of significant, and in our view unnecessary and potentially harmful changes in the manner in which divestitures in merger cases are overseen by the Department and the courts. Under proposed new section 7B of the Clayton Act, divestiture orders, issued with the consent of the parties or otherwise, would be prevented from becoming final before any divestiture required had been approved. 21/ Divestitures would not be considered acceptable remedies in section 7 cases unless they satisfied special new statutory standards--that they "fully restore" competition lost as a result of an acquisition, and that there is a "substantial likelihood" that a party acquiring assets pursuant to a divestiture will be a "viable competitor" for the foreseeable future. Finally, in approving a divestiture, the Attorney General, the FTC, or the court would be required to "insure that reasonable steps are taken to protect the interests of affected employees and to preserve employment consistent with the full restoration of competition."

21/ As currently drafted, the bill could be read as preventing litigated judgments that require divestiture from becoming final before the divestiture called for has been approved. This could be interpreted as an unwarranted attempt to limit a defendant's appeal of a litigated judgment until divestiture is completed.

A new statutory requirement that courts approve the specifics of all divestitures is unnecessary and unwise. Courts already consider the adequacy of divestiture generally when they consider proposed consent decrees under the Tunney Act or fashion divestiture decrees in litigated cases where the government has prevailed. Specific plans generally come before the court only when disagreements between the government and defendants cannot be resolved. Court approval can significantly delay antitrust relief and create uncertainty for potential purchasers and lenders that threatens divestiture. It simply is not in the public interest to subject all specific divestiture plans to unnecessary court approval.

Delay is the enemy of successful divestiture. Several studies support the proposition that a correlation exists between prompt divestiture and successful relief. 22/ For this reason, the Department requires, where practical, that acquisitions be cured of any anticompetitive effects prior to consummation. When the Department is satisfied that a divestiture is viable, court proceedings would simply delay

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22/ See Pfunder, Plaine, and Whittemore, Compliance With Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained, 17 Antitrust Bull. 19, 90-92 (Spring 1972); Elzinga, The Antimerger Law: Pyrrhic Victories?, 12 J. Law & Econ. 43, 54 (1969).

effective relief and consume scarce resources. In short, we believe that the procedural requirements of proposed new section 7B(a) may well inhibit or at least delay effective relief in merger cases rather than promote it.

We also believe that the proposed new substantive standards governing divestiture orders in section 4 of S. 1407 are unnecessary, and that they could complicate merger cases significantly. Proposed section 7B(c) of the Clayton Act requires that that when a challenged acquisition "substantially lessens competition," 23/ any divestiture must both "fully restore" competition and be made to a "viable purchaser."

The bill's requirement that divestiture fully restore competition may appear to be no more than a restatement of what merger enforcement is all about. On closer consideration, however, it could unnecessarily hamstring the enforcement agencies and the courts in their resolution of the competitive concerns that some acquisitions raise. "Fully restoring"

23/ The question whether an acquisition would "substantially lessen competition" is one that can only be resolved through litigation. No such finding of anticompetitive harm is made when defendants agree to a consent judgment to settle an action under section 7. Thus, it is unclear whether proposed section 7B(c) is intended to apply only to litigated divestiture orders, or how it would apply to consent agreements.

competition, while undefined, may be interpreted to require that every competitive overlap between the merging firms' business be entirely divested. Such an interpretation would, in effect, eliminate partial divestiture as a tool of antitrust enforcement. Partial divestiture is often found in antitrust decrees because full divestiture of all competing assets may not be needed to eliminate an acquisition's likely anticompetitive effects. Full divestiture might even be inconsistent with competitiveness and the economic efficiency that the antitrust laws seek to promote. It also could impose significant penalties on a divesting company that would be unnecessary to the preservation or restoration of effective competition. Finally, requiring the government to seek full divestiture in all consent decree negotiations could result in far fewer cases being settled by such decrees. Consent decrees save the government the time, expense, and risk of litigation and lead to prompt divestiture.

The bill's requirement that divestiture be made to a "viable purchaser," while laudable in intent, is simply unnecessary, and provides an invitation to disappointed would-be purchasers or others interested in thwarting proposed divestitures to try to complicate Tunney Act proceedings. The Department already seeks to ensure that every divestiture is viable. Our consent decrees require that purchasers have the managerial, operational, and financial capabilities to compete effectively. We thoroughly investigate every proposed divestiture and only approve those that we are convinced will be successful.

Since the beginning of 1984, the Department has supervised the successful divestiture of assets in 14 cases in which it challenged acquisitions under section 7 of the Clayton Act. All of these assets were divested to firms that we determined would constitute viable competitors. The divestitures ranged from sale of a single product line to divestiture of multiple company divisions.

In United States v. Waste Management, Inc., the Department entered into a consent decree in June, 1984 requiring the defendant to divest waste hauling businesses and assets in more than 30 local markets in order to obtain approval for its merger with SCA Services, Inc. This divestiture, involving assets worth approximately $275 million, was promptly and successfully completed to Genstar Refuse Services Corporation.

In United States v. Baxter Travenol Laboratories, Inc., and American Hospital Supply Corp., the Department entered into a consent decree in April, 1986 requiring divestiture of American Hospital Supply's American McGaw division, which manufactured intravenous solutions and IV solution administration sets, American Haemonetics division, which manufactured therapeutic hemapheresis equipment, and two surgeons' glove manufacturing facilities and related equipment. These assets promptly were sold for over $225 million. All were purchased by companies that intended to and have operated them as viable independent competitors.

In 1987, the Department supervised the sale, pursuant to the consent decree in United States v. Hughes Tool Co. and Baker International Corp., of Baker International's tricone rock bit (oil well drilling bit) and electric submersible oil well pump businesses. Both businesses were sold promptly to purchasers with industry expertise, a strong financial position, and the intention of vigorously competing with the assets acquired.

Where the Department concludes that a proposed divestiture is not viable, we reject it. In November of 1985, for example, we rejected an LTV proposal to divest its Gadsden, Alabama steel mill to an employee-owned corporation, because the plan, as then presented to the Department, created serious risks for the long-term viability of the plant. We subsequently supervised the divestiture of the plant to an aggressive competitor who has been operating it profitably.

The Department's track record on approving divestitures, viewed in hindsight, is not perfect. A divestiture of a stainless steel plant in Massillon, Ohio, required by the LTV consent judgment was made to a purchaser who ultimately failed. In our judgment, however, a court also would have permitted the original transaction on the basis of the facts that were then available.

The Massillon plant is now in the hands of another owner who has reopened it. Incidentally, with the reopening of the Massillon plant, the long-run goal of the LTV consent decree--the operation of the Gadsden and Massillon plants as viable, independent competitors--is likely to be achieved. Both plants were marginal steel mills, and their successful independent operation could not be guaranteed. Thus, these divestitures presented more risks than most. At the moment, however, both plants are being operated profitably. Had those plants not been divested, there is a strong likelihood that they would have been closed permanently in the aftermath of the eventual bankruptcy of LTV. As it now stands, both have the opportunity to continue as independent competitors in the domestic steel industry.

All in all, the Department has been highly successful in administering divestitures. Court approval is not necessary to insure protection of the public interest and, indeed, could unintentionally impede successful divestiture. Mandatory judicial consideration of viability could discourage potential purchasers not willing to have their finances made part of the public record, as well as seriously delay divestiture.

Finally, the requirement in proposed new section 7B(c) that the interests of affected employees be protected and employment preserved as a matter of course in approving divestiture orders is inappropriate. We sympathize, of course, with the plight of employees adversely affected by management decisions occasioned by acquisitions. But such decisions are at the heart of the managerial process. Courts and government agencies are ill suited to second-guess decisions concerning the number of workers a business will employ and where they should be located. Moreover, statutory restraints on an employer's efforts to make divested operations more efficient could reduce the profitability of the divested enterprise and thus reduce the chances of a successful divestiture.

We simply do not understand how a court could make a determination concerning how to weigh the increased competition that would result from a divestiture against the reductions in employment that might be required to make the divestiture successful. There is also the possibility that by laying-off employees at the time of the divestiture a strong new competitor would be created that could add employees in the future, or that would provide immediate employment opportunities among its suppliers or in its own plants in other areas.

The antitrust laws do not and should not regulate the internal workings of businesses with regard to matters unrelated to competition. Rather, they are concerned with how companies must act or refrain from acting with respect to competitors, customers, and suppliers. Thus, antitrust litigation is a particularly poor forum for decisions involving employee relations. Employees of divested businesses, like their counterparts in the economy at large, are protected by an array of federal and state labor laws to which they may turn for a redress of labor-related grievances. For all of these reasons, issues of employment and restoration of competition should not be mixed together in divestiture proceedings.

TUNNEY ACT AMENDMENTS--
STATE ATTORNEY GENERAL INTERVENTION TO PRESERVE EMPLOYMENT

Section 5 of S. 1407 would amend the Tunney Act to give a state attorney general the right to intervene in a Tunney Act proceeding when a proposed decree provided for the divestiture of one or more enterprises or facilities employing more than 100 full-time employees in that state. This proposal would unnecessarily complicate government antitrust litigation. Currently, courts have the authority to allow any party to intervene in Tunney Act proceedings or otherwise make its views known whenever such participation would be helpful in making the public interest determination that that Act requires. To grant intervention as of right to third parties, even to state attorneys general, in order to address concerns that are peripheral to the competition issues being considered by the court would serve primarily to slow down the divestiture process and thereby make successful divestiture less likely. Moreover, as noted above, focusing on the preservation of employment opportunities in a particular location is really not relevant to, and could in many situations even be at odds with, the purpose of the antitrust laws to restore effective competition through divestiture.

TUNNEY ACT AMENDMENTS-- MODIFICATIONS AND DISMISSALS

Section 6 of S. 1407 would amend those provisions of the Tunney Act that currently govern the entry of consent judgments in civil antitrust cases filed by the Government. These provisions, codified at 15 U.S.C. § 16(b)-(h), provide specific procedures for the court and the parties to follow in connection with the entry of consent decrees. The provisions are intended to afford a meaningful opportunity for public comment on the specifics of such decrees to help ensure that they will be in the public interest.

Section 6 would amend the Tunney Act to extend its procedures to consented-to modifications of decrees in government antitrust cases and to dismissals of such cases. Amendments to the Tunney Act along the lines of those proposed by S. 1407 would constitute extremely important and sensitive legislation. They require close attention to important public policy and constitutional ramifications.

Existing law requires judicial approval of nearly all consensual resolutions of government antitrust cases. Under current law, a proposal for a consent judgment in a government antitrust case must be filed with the court and published in the Federal Register at least 60 days before its effective date. Copies of the proposal and of materials considered by the United States to be determinative in formulating the proposal are to be made available to the public. Unless otherwise directed by the court, the United States must at the same time similarly file and publish a competitive impact statement reciting the nature and purpose of the proceeding, a description of the practices or events giving rise to the alleged antitrust violation, an explanation of the proposed judgment (including the relief to be obtained and the anticipated effects on competition of such relief), the remedies available to potential private plaintiffs in the event that the proposed judgment is entered, a description of the procedures available for its modification, and a description of alternatives to the proposal that were actually considered by the United States.

The Act also requires summaries of the proposal and the competitive impact statement, and a list of the other materials that must be made publicly available, to be published in newspapers of general circulation for 7 days over a period of 2 weeks, commencing at least 60 days prior to the effective date of the proposed judgment. During the 60-day waiting period, any interested person may file written comments, which must be considered by the United States, filed with the court, and published in the Federal Register. At the end of the 60-day period, the United States must file and publish a response to such comments.

Before entering the judgment, the court must determine that it would be in the public interest. The court is explicitly authorized to consider the competitive impact of the judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and the impact upon the public generally and upon individuals alleging specific injury from the violations set forth in the complaint. In making its determination, the court may take the testimony of government officials or experts, appoint a special master or outside consultants, request the views of any individual, group, or government agency with respect to any aspect of the judgment, authorize full or limited participation by interested parties pursuant to the Federal Rules of Civil Procedure, view any comments and responses, and take such other action in the public interest as it deems appropriate.

For its part, each defendant must file, within 10 days of the filing of the proposed judgment, a description of any and all oral or written communications on its behalf with any officer or employee of the United States, other than communications between counsel of record and the Department of Justice.

Thus, under existing law, all proposals for consent judgments in Govenment antitrust cases must follow extensive procedures intended to assure opportunity for comments by interested parties and appropriate judicial review before their entry. Since most government civil antitrust cases end in consent decrees, the Tunney Act as it stands today is a statute of very broad application.

Section 6 of S. 1407 would make that application even broader. It would maintain the current requirements of the Tunney Act, extending them with minor substantive accommodations, to motions for dismissal and proposals for modification of judgments. These are significant and in some ways problematic extensions of the Tunney Act. Application of the Act to dismissals of Government antitrust cases raises sensitive issues regarding the appropriate roles of the executive and judiciary in the enforcement of the laws of the United States. Extension of the procedures required by the Act to modifications of consent decrees requires close attention to the possibility that unnecessary costs might be incurred in matters of little or no public significance.

Application of Tunney Act procedures to dismissals of government antitrust cases is a most troubling new proposal in S. 1407. Whether or when to dismiss an enforcement action is and should be regarded as a prosecutorial rather than a judicial decision. Under our constitutional system, Congress makes laws, the executive brings specific cases before the courts to enforce them, and the judiciary resolves these cases. The antitrust laws in particular are worded in very general terms; necessarily, substantial prosecutorial discretion must be exercised in deciding what matters to investigate, what cases to bring, and what theories to propound. These decisions are made by the Department on a daily basis, not only in enforcing the antitrust laws, but also in the enforcement of the laws of the United States generally. They are basically decisions as to what legal and factual matters the courts will be asked to decide. Clearly, a decision to dismiss a case at some stage falls in this category. It represents a prosecutorial determination that grounds do not exist for continued prosecution. In the civil antitrust context, this may be so because of mootness, as in the case of a challenge to a merger that has been abandoned by the parties, or because of legal or factual problems revealed by concurrent criminal action, or simply because the facts uncovered post-complaint demonstrate that continued efforts to prove that some person--individual or corporate--has violated the law would be an abuse of the prosecutorial seal and a waste of the taxpayers' money. A decision to dismiss a case, to refrain from carrying it through to the very end, is thus tantamount to a decision not to bring a case at all. 24/

To dismiss a case without any adjudication of fact or law and without any exercise of the legal or equitable powers of

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24/ Of course, decisions to dismiss cases are relatively rare compared with pre-complaint decisions not to institute investigations or to terminate investigations without prosecution.

the court differs significantly from the entry of consent judgments in govenment antitrust cases, to which the Tunney Act currently applies. In the latter situations, courts are asked to impose burdens on parties--responsibilities that can be ignored only upon pain of possible contempt. The equitable authority of the courts is invoked in such circumstances, and the courts exercise that authority in support of, and to assure the integrity of, their own judicial powers, the exercise of which the parties have requested by proposing a consent decree. Courts would have the power, even in the absence of the Tunney Act, to review a proposed consent judgment from the public interest standpoint, and to employ reasonable Tunney Act-like procedures in that review. The entry of a consent judgment is a judicial act. In contrast, the dismissal of a case is a prosecutorial act.

Application of the Tunney Act to dismissals would unfortunately and unnecessarily confuse the roles of judge and prosecutor in civil antitrust enforcement. From the defendant's standpoint, and indeed from the standpoint of justice itself, the fairness and impartiality of the court before which a case is tried would be seriously impaired if the judge had in some way opined upon or influenced the continuing prosecution of the case. And when a decision is made not to prosecute a matter--either before or after the filing of a complaint--the public is entitled to understand that the prosecutor is responsible, and to focus any objections and remedial efforts on that prosecutor. The clear separation of prosecutor and judge is a fundamental principle of our law enforcement system, and judicial participation in prosecutorial decisions would be inconsistent with this principle.

Since a decision to dismiss a case must remain in the province of the prosecutor, the question that remains is whether legislation is needed to ensure that a public airing of the reasons for such a decision take place as a part of the judicial proceeding itself. In our view it is not; in fact, any controversial dismissal decision is unlikely to escape adequate public notice and inquiry. The Department makes it a practice to announce not only the fact of but also the reasons for any extraordinary dismissal of a civil antitrust case. Moreover, as indicated above, such dismissals are very rare. Thus, there is no need for additional legislation in this regard, and in any event no need to require that the judiciary subvert its impartiality by playing any active investigatory or publicity role.

With these general views on the application of the Tunney Act to dismissals in mind, we turn to the specifics of S. 1407. Section 6 significantly alters the the roles of the judiciary and the executive with respect to dismissals of antitrust actions. New section 5(b) of the Clayton Act would provide that civil proceedings may be terminated only upon order of the court. New section 5(g) of the Clayton Act would provide that prior to entering an order for dismissal, the court must determine "whether or not such order is in the public interest." While this provision appears to permit the court to order a dismissal even if it determines that such an order is not in the public interest (and thus differs from that for a consent judgment which may not be entered without an affirmative determination that it is in the public interest), the bill, as written, could be interpreted as empowering courts to decline to dismiss a case in such circumstances. A dismissal would thus no longer be a prosecutorial act; rather it would be a matter of judicial discretion.

In addition, putting the issue of authority to dismiss aside, in directing the courts to review the substance of dismissal decisions, to conduct perhaps extensive legal and factual investigations of their merits, and to issue opinions on the wisdom or lack of it in continuing to prosecute, we believe that section 6 would unwisely confuse prosecutorial and judicial functions.

Since a dismissal may come at any time after a complaint is filed, the record before the court at the time may be virtually nonexistent, or only partially complete. In these varying circumstances, the extent to which section 6 directs the courts to use their broadly-defined investigatory powers to try to resolve the relevant merits and relief issues is most unclear and laden with potential problems. Certainly, the courts should not be embarking on any full-scale trial of these issues--dismissals are supposed to put an end to litigation, not engender it. On the other hand, courts may feel reluctant to make the determination required by section 6 without at least some significant factual and legal reassurances. This dilemma--how far to go on merits and relief issues--seems the inevitable result of demanding that the courts perform an investigatory role--constitutionally, one of the traditional functions of the Executive--rather than their proper task of impartially deciding, fully and fairly, cases and controversies pressed on them by parties to such disputes.

With respect to applying the Tunney Act to modifications of consent decrees, such modifications are today subject to judicial determinations as to whether they are in the public interest. The courts have the powers they need to conduct whatever proceedings are reasonable and necessary in making those determinations. It is the policy of the Department to suggest to the courts particularized, effective procedures to follow in considering proposed modifications. We are concerned that simply amending the Tunney Act to cover all consent decree modifications might lead to unnecessary expenditures of time and money, by the Department and the courts, in cases where proposed modifications are perhaps technical in nature, or of significance only to the immediate parties.

To summarize, section 6 raises a number of very difficult legal and policy issues. It alters the role of the judiciary in the handling of dismissals, making the judge at least an advisor to the prosecution regarding the wisdom of a dismissal and, as written, could be interpreted to make the judge the ultimate decisionmaker. It also places rigid requirements on all modifications to consent decrees, possibly imposing unnecessary costs on the courts and the parties. We recommend against adoption of section 6 in its current form, and against any legislation applying the Act to dismissals of government antitrust cases.

STANDING IN PRIVATE SECTION 7 CASES

Section 7 of S. 1407 would amend section 16 of the Clayton Act, which authorizes injunctive relief for private parties threatened with loss or harm by a violation of the antitrust laws, to grant competitors automatic standing to challenge violations of section 7 of the Clayton Act. This provision would reverse the decision of the Supreme Court last term in Cargill, Inc. v. Monfort of Colorado, Inc., 25/ a decision authored by Justice Brennan. In that decision, the Court held that "in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes the defendants' acts unlawful.'" 26/

The Department of Justice participated as amicus curiae in Monfort and urged the Court to hold, as it did, that a showing of antitrust injury was a prerequisite for standing under section 16. 27/ The purpose of requiring a showing of

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25/ 107 S. Ct. 484 (1986).

26/ Id. at 491.

27/ The Department noted in its brief, and the Court appears to have assumed, that the requirement of antitrust injury for standing under section 16 is in addition to the normal standing requirement that the plaintiff allege that it personally suffered some actual or threatened injury, not merely that the conduct complained of injured or will injure someone. Section 7 of the bill can be read as an attempt to grant competitors an absolute right to challenge violations of section 7 of the Clayton Act, eliminating even this minimal constitutional standing requirement and permitting competitors to challenge mergers, for example, out of mere spite or because of a desire themselves to acquire or merge with one of the parties if the merger being challenged can be prevented. In discussing general standing requirements in another context, the Court has held that "[i]n no event may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a

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antitrust injury is to ensure that the remedies provided by the Clayton Act are used to advance, rather than retard, the goals established by the antitrust laws. Competitors of merging companies have perverse incentives to challenge mergers. Mergers that are in fact anticompetitive likely will result in higher prices to consumers and higher prices for all competitors in the relevant market. Such mergers are unlikely to be challenged by competitors. On the other hand, mergers that result in greater competition likely will lower prices to consumers and thus lower prices and profits for other competitors in the market. This type of "injury" is most likely to draw challenges to mergers from competing companies, as was found to be the case in Monfort.

Challenges by competitors fearful of lower prices and more intense competition are usually framed as allegations that the merged entity is going to engage in predatory pricing. 28/ As

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27/ Continued

distinct and palpable injury to himself' that is likely to be redressed if the requested relief is granted . . . ." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)(citations omitted).

28/ Predatory pricing is pricing below some appropriate measure of cost by a company in order to drive competitors out of business, then raising prices to supracompetitive levels after competitive checks on such behavior have been eliminated.

the Supreme Court has recently noted, predatory pricing is rarely engaged in because rarely can it be engaged in profitably. 29/ A firm engaging in predatory pricing generally must have a substantial share of the market (or a substantial share of the excess capacity in the market) in order to absorb its competitors' customers. There also must be sufficient barriers to entry to prevent new competitors from entering the market (or old competitors from re-entering) in response to the supracompetitive prices that the predatory pricer must charge to recoup the losses that it incurred while it was pricing below cost. It is generally much easier, and much more profitable, for a company that wishes to behave anticompetitively to collude with its competitors to raise prices rather than to attempt to drive them out of business by lowering prices. Thus, it is far more likely that price decreases following a merger are the result of increased competition rather than of predatory pricing.

We do not believe that the Supreme Court's decision in Monfort was hasty or ill-considered, and we therefore oppose its legislative reversal. We do not believe that Congress

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29/ See Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)("[P]redatory pricing schemes are rarely tried, and even more rarely successful.")

should selectively make it easier for those with the greatest incentives to challenge procompetitive mergers to do so. Mergers have at least as great a potential to be procompetitive as anticompetitive, and for the good of our economy should not be interfered with in the absence of clear indicia of likely harm. Mergers delayed by spurious competitive suits are very often mergers denied, a good reason to preserve a sound rule of antitrust standing in such cases. Truly anticompetitive mergers are most likely to be challenged by customers or suppliers of the merging firms or by the federal government suing on their behalf. Competitors who cannot even show that they will be injured in a way cognizable by the antitrust laws if a merger proceeds are no paladins of consumer welfare. They should not be permitted to challenge the lawfulness of mergers under section 16. On the other hand, competitors of merging firms that can make a credible claim that they will suffer antitrust injury if a merger is consummated should be able to challenge that merger, as they are fully free to do following the *Monfort* decision.

Mr. Chairman, this concludes my prepared remarks. I will be happy to answer any questions that you or other members of the Subcommittee may have.

Senator METZENBAUM. Thank you very much. I do have some questions, but I think first we will hear from Mr. Oliver.

Happy to have you with us again, Mr. Oliver.

STATEMENT OF DANIEL OLIVER, CHAIRMAN, FEDERAL TRADE COMMISSION, WASHINGTON, DC

Mr. OLIVER. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee. On behalf of the Federal Trade Commission I would like to thank the subcommittee for the opportunity to discuss certain provisions of the proposed Antitrust Remedies Improvement Act of 1987, S. 1407, and sections 201 through 217 of the proposed Intellectual Property Reform Act of 1987, S. 635. In brief, the Commission favors the reform of treble damages and claim reduction, and recommends against changing the standing rules under section 7.

Section 3 of S. 1407 would enable the United States to recover treble damages for antitrust injury, and the Commission supports that provision. However, the Commission also supports section 212 of S. 635, which would limit the availability of treble damage relief—for all plaintiffs—to situations involving overcharges and undercharges. My personal support for section 3 of S. 1407 is contingent on enactment of the treble damages limitation embodied in S. 635. Also, in my view, treble damage relief should be limited to hard-core cartel conduct——

Senator METZENBAUM. Mr. Oliver, I think you are reading so rapidly that the value of your remarks may be slipping past some of us on the committee, as well as some in the audience.

Mr. OLIVER. I was so excited to get to it. I will slow down, though.

Treble damage relief should be limited to hard-core cartel conduct such as horizontal price-fixing and market division.

Section 7 of S. 1407 would give all horizontal competitors standing to sue to enjoin violations arising under section 7 of the Clayton Act. The Commission strongly opposes any grant of antitrust standing to firms that have not suffered genuine "antitrust injury" flowing from anticompetitive behavior. The proposed amendment would, in effect, permit a firm to attack a competitor whose only crime was to become more efficient after a merger or acquisition. It would be inconsistent with the protection of competition—and, in particular, would chill procompetitive mergers and acquisitions—to permit firms to attack their competitors for engaging in vigorous competition.

Section 203 of S. 635 addresses the excessive settlements problem that results from the conjunction of treble damages exposure, and joint and several liability. Because antitrust defendants are jointly and severally liable, when a plaintiff settles with one defendant involved in an alleged antitrust conspiracy, the total potential damage award is reduced only by the amount the plaintiff actually receives. The potential liability for the remaining defendants is thereby magnified, producing a whipsaw effect that may induce defendants to abandon their factual claims and legal defenses, regardless of merit, in a competitive rush to settle. S. 635 would eliminate the "whipsaw effect" by reducing the plaintiff's total possible recovery by the amount of damages, actual or trebled, fairly allocable to any person the plaintiff releases from liability. Thus, the proposal legislation would reduce the rewards of—and, hence, the incentive to file—spurious antitrust claims.

Section 212 of S. 635 would restrict the availability of treble damages to persons who have actually suffered anticompetitive overcharges or undercharges attributable to an antitrust violation. Recovery by other antitrust plaintiffs would be limited to full compensation—actual damages, plus prejudgment interest, of course, and attorneys' fees. We support this proposal.

The antitrust laws are designed to prohibit—and, hence, to deter—anticompetitive conduct that produces higher prices, reduced output, and diminished consumer welfare. The damages assessed when a violation is discovered should be large enough, when discounted by the probability of detection, to ensure that a prospective violator's expected liability exceeds his expected gain.

The probability of detection varies with the nature of the violation. Mergers and vertical arrangements, for example, are seldom concealed. By contrast, hardcore cartel activities, such as price-fixing and market division conspiracies, are much more likely to be concealed. Participants in such conspiracies always try to keep them secret because they know that they are patently illegal. Moreover, such conspiracies usually manifest themselves only in the form of supracompetitive prices to purchasers, which are usually difficult to detect.

Treble damages are not needed for categories of antitrust defenses that are not likely to escape detection by the injured party or parties. We, therefore, recommend that the proposed legislation be modified to permit treble damage recoveries only for plaintiffs who have been overcharged—or underpaid—by reason of horizontal agreements among competitors that have increased—or reduced—prices.

My personal preference would be to further limit the availability of treble damage relief to hardcore cartel conduct, which is typically not only difficult to detect, but also unambiguously illegal and clearly anticompetitive.

That concludes my prepared statement, Mr. Chairman. I would be happy to answer any questions you have.

[The prepared statement of Mr. Oliver follows:]

STATEMENT
OF
FEDERAL TRADE COMMISSION

PRESENTED BY
DANIEL OLIVER
CHAIRMAN

BEFORE THE
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
CERTAIN PROVISIONS OF THE
ANTITRUST REMEDIES IMPROVEMENTS ACT OF 1987, S. 1407
AND
THE INTELLECTUAL PROPERTY REFORM ACT OF 1987, S. 635

March 31, 1988

Mr. Chairman and members of the Subcommittee:

On behalf of the Federal Trade Commission, I would like to thank the Subcommittee for offering us this opportunity to provide our views concerning certain provisions of the proposed Antitrust Remedies Improvement Act of 1987, S. 1407, and Sections 201-217 of the proposed Intellectual Property Reform Act of 1987, S. 635. For the reasons discussed below, the Commission favors the reform of treble damages and claim reduction, recommends against changing the standing rules under Section 7, and takes no position with respect to enlarging the Tunney Act because that change would affect only the Department of Justice.

I. S. 1407: Government treble damages

Section 3 of S. 1407 would enable the United States to recover treble damages for antitrust injury, thus treating both the government and private plaintiffs in the same fashion. The treble damage feature of the antitrust laws operates as both an incentive -- encouraging victims to pursue recovery -- and a deterrent -- discouraging prospective violators from undertaking unlawful conduct. Because the United States does not assess litigation decisions using the same cost/benefit calculus employed by private plaintiffs, there is no necessity to offer an incentive for recovery suits by the government. However, it is important to convince potential violators that victimizing government purchasers and sellers is just as dangerous as bilking private parties. Therefore, the Commission supports the extension of treble damage relief to the United States. As I will mention later in my comments concerning the Intellectual Property Reform Act, the Commission also supports the limitation of treble damage relief to situations involving overcharges and undercharges, and would apply that limitation to government suits as well. In any event, however, we believe that violators should face the same damage exposure regardless of whether government or private parties are involved.

II. S. 1407: Tunney amendment extension

Section 6 of the proposed bill would impose certain procedural requirements on dismissals and judgment modifications in civil antitrust cases brought by the Attorney General. The Commission expresses no opinion concerning this proposal because it would apply only to the Department of Justice.

III. S. 1407: Overturning Cargill, Inc. v. Monfort, Inc.

Section 7 of the proposed bill would vest all horizontal competitors with standing to sue for injunctive relief against violations arising under Section 7 of the Clayton Act. The Commission strongly opposes any grant of antitrust standing to firms that have not suffered genuine "antitrust injury" flowing from anticompetitive behavior. The proposed amendment is overbroad because it would permit a firm to attack a competitor whose only crime was to become more efficient after a merger or acquisition. It would even grant standing to sue a competitor who participated in a vertical or conglomerate merger. This change in the law would overturn the recent Supreme Court decision in Cargill, Inc. v. Monfort, Inc., and would reverse the entire development of the law on standing. As the Supreme Court's opinion in Monfort noted, "Brunswick holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. . . . [C]ompetition for increased market share . . . is not activity forbidden by the antitrust laws." Cargill, Inc. v. Monfort, Inc., 107 S.Ct. 484, 492 (1986). It would be inconsistent with the protection of competition to permit firms to secure injunctive relief to prevent their competitors from engaging in vigorous competition.

IV. S. 635: Claim Reduction

Sections 201-217 of S.635, the Intellectual Property Reform Act of 1987, contain a number of changes in the remedies available to the prevailing party in antitrust cases. Section 203 of S.635 attempts to solve the "excessive settlements" problem that results from the conjunction of treble damages exposure, and joint and several liability. If a group of defendants is found guilty of conspiratorial behavior, and is thus liable for damages in an antitrust case, each participant is jointly and severally responsible for the plaintiff's entire, trebled recovery. Should the plaintiff settle with one defendant, the total potential damage award is reduced only by the amount received by the plaintiff from that settlement. The potential liability for the remaining nonsettling defendants is thereby magnified, producing the so-called "whip-saw effect" that may induce defendants to abandon their factual claims and legal defenses, regardless of merit, in a competitive rush to settle. This process affects not only the distribution of settlement payments among the defendants, but also the amount of total payments.

S.635 would reduce the plaintiff's total possible recovery by the amount of damages, actual or trebled, "fairly allocable" to any person the plaintiff releases from liability, rather than merely by the amount of that person's actual settlement. Each defendant's expected liability would therefore be unaffected by the settlement decisions of other defendants, and there would be no competition to settle. Moreover, no defendant would be willing to pay more than his own share of the total expected liability. By eliminating the "whip-saw effect," the proposed legislation would reduce the rewards of -- and hence the incentive to file -- spurious antitrust claims.

One difficulty posed by a claim reduction scheme is how to allocate liability among the conspirators. Under the bill, if the antitrust injury was caused by overcharges or underpayments arising from a conspiracy among horizontal competitors, then damages would be allocated according to each competitor's proportional share of the total overcharges or underpayments in the affected market. Damages for all other violations would be allocated on the basis of the relative responsibility for the origination or the perpetration of the violation, unless the court determined that allocating damages by market share would produce a "more equitable result."

The proposed allocation approach is attractive in concept but likely to be difficult in practice. The concept of joint and several liability is strongly entrenched in American common law partly because it avoids the necessity of making difficult and arbitrary apportionments of guilt among members of a conspiracy. We suggest that the relative guilt standard be employed only when there is a strong factual predicate for an apportionment of damages.

V. S. 635: Limitation of treble damages

Section 212 of S.635 would restrict the availability of treble damages to persons who, as purchasers, have paid supracompetitive prices (or, as sellers, have received artificially low prices) attributable to an antitrust violation. Recovery by other antitrust plaintiffs, including those suing for lost profits, would be limited to full compensation -- actual damages plus prejudgment interest, costs, and attorneys' fees. We support this proposal.

The antitrust laws are designed to prevent firms from engaging in cartelization and other kinds of anticompetitive conduct that result in higher prices, reduced output, and diminished consumer welfare. As an adjunct to criminal and civil penalties, private rights of action providing for fully compensatory single damages can help deter anticompetitive activity by encouraging private parties to discover and challenge it. Indeed, if we could be confident that all anticompetitive conduct was sure to be detected and the perpetrator sued, fully compensatory liability would eliminate any incentive to violate the law.[1] Full compensation is also consistent with traditional notions of distributive justice.

On the other hand, if it is likely that some violations will go undetected, a different calculus is appropriate for effective deterrence. The damages assessed whenever a violation actually is discovered should be sufficiently large that, discounted by the probability of detection, the potential violator's expected liability exceeds his expected gain. This is the primary justification for trebling the award of damages in antitrust cases.

The probability of detection, however, varies with the nature of the violation. Mergers, for example, can seldom be concealed. Similarly, firms or individuals that are the targets of unlawful exclusion, predation, or refusals to deal, or distributors who have been improperly terminated or required to adhere to the terms of an illegal marketing arrangement, will ordinarily be well aware that they have been victimized. In contrast, price fixing cartels and other kinds of anticompetitive activity that manifest themselves only in the form of supracompetitive prices to purchasers may frequently go undiscovered.

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[1] Under the terms of the proposal, in those cases where the defendant would henceforth be liable for only actual damages, the award of prejudgment interest would be virtually automatic. In those cases still giving rise to treble damages, prejudgment interest on actual damages would be awarded only if the court found that the award of all or part of such interest would be just in light of any efforts on the part of the opposing party to delay or otherwise increase the cost of the litigation. In cases subject to single damages, this proposal should help discourage defendants from using delaying tactics to postpone the determination of damages.

Even if the boundary lines between unlawful anticompetitive conduct and socially desirable procompetitive behavior were clear, there would still be drawbacks to permitting the award of treble damages against all antitrust violations. Although deterrence of anticompetitive conduct would be reinforced, the incremental social benefits might not justify the cost of the additional resources that would be allocated to private enforcement. Whenever the available damages exceed the cost of prosecuting a suit, a private party has an incentive to attempt recovery. For this reason, private enforcement of the antitrust laws, coupled with multiple damages, can lead to excessive claims being filed.

For categories of antitrust offenses that are not likely to escape detection by the injured party or parties, treble damages appear to be undesirable. Thus, enactment of the proposed legislation is sensible only insofar as it allows treble damage awards against horizontal price fixing and market division conspiracies. Unfortunately, the proposed legislation might also allow treble damages in purchaser suits involving tying arrangements, resale price maintenance, or other vertical arrangements. Vertical arrangements are ordinarily quite visible, and thus unsuitable as targets for treble damages. Thus, it makes little or no sense to grant treble damages in vertical restraint cases. We recommend that the proposed legislation be modified so that treble damage recoveries would be available only to plaintiffs who have been overcharged (or underpaid) by reason of horizontal agreements among competitors that have increased (or decreased) prices.

VI. S. 635: Treble damages to government

S.635 proposes that the government receive treble damages when it sues for recovery of illegal overcharges or underpayments. As noted previously, we believe that persons engaged in unlawful conduct under the antitrust laws should face the same damages exposure regardless of whether the victim is the government or a private party.

The Commission hopes that these comments are useful to you.[2] I would now be pleased to answer any questions you may have.

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[2] With respect to the discussion in Part I of this statement, Chairman Oliver wishes to make it clear that while he supports the provision in S. 1407 extending treble damage relief to the United States, his support is contingent on enactment of the treble damages limitation embodied in S. 635. In his view, treble damage relief should be limited -- with respect to all plaintiffs -- to conduct that is not detectable; that is, hard core cartel conduct, because it is unambiguously illegal and clearly anticompetitive.

Commissioner Calvani joins in this statement, and also supports the parens patriae provision -- Section 2 -- of S. 1407.

Commissioner Azcuenaga joins only Parts II and III of this statement. She agrees that some limitations on the use of treble damages and on joint and several liability are appropriate, but declines to join the discussion of these issues in the statement.

Although he does not join in this statement, Commissioner Strenio strongly supports Section 2 of S. 1407, which would extend the parens patriae provision of the Clayton Act to the Federal Trade Commission and the Attorney General. By separate letter, he has transmitted to the Subcommittee a detailed explanation of his views on that provision.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE COMMISSIONER

March 29, 1988

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Antitrust,
  Monopolies and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Metzenbaum:

In your March 11, 1988 letter to the Federal Trade Commission ("FTC" or "Commission"), you requested comment on S. 1407 and Sections 201-217 of S. 635. I did not join in the Commission letter regarding various aspects of the pending legislation. However, because your staff informed my office that comments on other provisions would be welcome, I take this opportunity to express my strong support for Section 2 of S. 1407.

Section 2 of the Antitrust Remedies Improvement Act would amend Section 4C of the Clayton Act to give parens patriae power to the Federal Trade Commission and the Attorney General. At present, only the state attorneys general have this specific power.[1] The amendment also would allow the court, at its discretion, to order distribution of any award to the class of persons on whose behalf a suit is brought.

I support consumer redress as a remedy for violations of the antitrust laws. The traditional remedy used by the FTC in antitrust cases is to enjoin future violations through the Commission's "cease and desist" order authority. However, many consumers may suffer substantial and uncompensated injury in the absence of additional action. Consumer redress can make the injured party whole again by seizing funds derived from illegal acts and returning them to the victims.

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[1] The Commission has the authority under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), to obtain disgorgement of ill-gotten gains from antitrust violators. Such disgorgement may be ordered by a federal court as ancillary equitable relief derived from the Commission's authority to obtain permanent injunctions. However, the Commission has never litigated this issue.

Of course, the Commission's Section 13(b) authority confers the ability to disgorge only the amount of ill-gotten gains taken by law violators. An advantage of the parens patriae provision of S. 1407 is that it would expressly confer upon the Commission the ability to obtain treble damages and thereby appreciably enhance the FTC's capability to deter antitrust violations.

The deterrent value of the antitrust laws also would be increased by enactment of Section 2, as would the likelihood of prosecution of cases involving only relatively minor individual injury spread over a large national class of consumers. Naturally, use by the Commission of parens patriae authority to obtain consumer redress in specific horizontal collusion cases should be preceded by consultation with the Justice Department. Procedures, such as those already established in the merger field, can be devised for determining which agency will take the lead in handling any particular case.

Thank you for your consideration of these views.

Sincerely yours,

Andy Strenio

Andrew J. Strenio, Jr.
Commissioner

Senator METZENBAUM. Thank you very much.

In fairness to each of my colleagues and others who may arrive, I will ask the timekeeper to let us know when 10 minutes is up for each member of the committee.

I will throw this to both of you because I think it concerns both of you. Last week, as you know, nine States sued several insurance firms for engaging in what California Attorney General John Van de Kamp called an illegal "global insurance boycott that helped trigger the insurance crisis of 1984-1985."

It is interesting to me that this action was taken by the States and not by the Justice Department, which in times past, at least, was the chief antitrust enforcer in the land. I read that the Department did not think there was anything to these charges so it did not investigate.

Mr. Rule, you yourself were quoted in the Post as saying that "Nobody gave us any information." Well, the States did not wait for somebody to give them information. They went out and got it: evidence of secret meetings and communications among insurance executives, constituting a worldwide insurance conspiracy that cost consumers billions of dollars.

I know this is a little off the subject of today's hearing, but you are here and it is timely. So I must ask you: Where was the Justice Department? Where was the FTC in all of this? Did it just not care? Did it make a mistake? What happened?

And I guess I further would say it is obvious that those attorneys general were innovative enough to figure out a way to move in on this crisis in the insurance industry, notwithstanding the McCarran-Ferguson Act exemptions as far as the antitrust laws are concerned.

Mr. Rule?

Mr. RULE. Well, let me first of all say that I would prefer not to comment on a suit that is in active litigation, even though it is not our suit. And this is not to suggest that it is not a valid complaint. On the other hand, it is not that hard to file a complaint. We will see through the course of litigation whether or not there is a violation and whether or not the charges are substantiated.

What happened was that about 2 years ago we were supplied with some information that we looked at. But as I understand it—and I will let the chairman discuss it—the FTC had initially looked into the charges and concluded that there was not a problem. Under the normal clearance process, only one agency performs an investigation. But we did send a letter where we indicated that what we knew about the situation was consistent with what the FTC had concluded.

I also think if it turns out there is a criminal violation or there is evidence of a criminal violation, then I think you can count on us to bring an action. And we will.

On the other hand, there is nothing wrong—in fact, I think it is a very healthy statement about antitrust enforcement—if you have State attorneys general bringing suits. They have resources. There are a lot of attorneys now who are going to be involved in this case, and we will see how it proceeds. But I think it is perfectly consistent with the Federal system that we have to expect them to bring some suits. There is no particular advantage we have in the area of civil enforcement. So, you know, we will see how that proceeds.

I think it is a good thing that States are, in effect, litigating in some areas and we are litigating in other areas. We are very strong in the criminal area. The States cannot do that as well. The FTC cannot do it at all. I think that is where we ought to focus, and I think it is perfectly healthy for States to look in other areas and to pursue cases. And we will see if they have the evidence and the law on their side.

Senator METZENBAUM. It is my understanding you do support repeal of the McCarran-Ferguson Act?

Mr. RULE. As I have said, yes, sir. As we have stated, we can support, if appropriately crafted, a repeal of McCarran-Ferguson. I do not think it would be appropriate for me to try to apply that to the litigation—I really do not because it may be that it is a perfectly meritorious suit; it may be that it is not. I do not know, and I do not want to suggest one side or the other has the upper hand. So I am not going to try to say that the conduct alleged falls inside or outside of McCarran-Ferguson. But certainly, if there were some change in McCarran-Ferguson as we have discussed, if there were a bill, the prospects for the litigation—the litigation itself and the conduct—may have been very different from what it was in this case.

Senator METZENBAUM. Mr. Oliver, do you care to comment on this subject?

Mr. OLIVER. I do not believe I can add a lot to what Mr. Rule has said. The staff of the FTC did, as he indicated, investigate the matter and concluded there was no reason to bring a case on the evidence they had. You described the activities of the attorneys general as innovative, and that may well be; but they are still only at the complaint stage, and we do not know how the case will turn out.

As you know, I also have supported the repeal of McCarran-Ferguson.

Senator METZENBAUM. When nine States come together and their attorneys general conclude that there is enough basis for a conspiracy action, conspiracy to boycott, figure out an innovative approach to get around the McCarran-Ferguson exemption, do you perhaps have second thoughts as to whether or not the FTC and the Antitrust Division possibly missed the boat and have let one go by that they should have picked up on, since the matter was, indeed, before you?

Mr. OLIVER. I would be perfectly happy to look at the attorneys' general complaint, but I basically have confidence in the FTC staff.

Senator METZENBAUM. Mr. Rule, let me go back to other subjects, then.

Do you agree with me that it is important to deter anticompetitive behavior?

Mr. RULE. I certainly think it is appropriate, yes, to deter anticompetitive behavior. No question about that statement.

Senator METZENBAUM. And do you agree that it is also important that we have an effective way to do that by permitting private antitrust suits to be brought?

Mr. **Rule**. Certainly, I think the private attorneys general tradition in antitrust in a good one.

Senator **Metzenbaum**. Well, I have looked at the administration's proposal to eliminate treble damages for many antitrust violations. You are now asking Congress to undo 70 years of antitrust law. Today, a small business person who is deliberately driven out of business by a large competitor who wants to monopolize the market can sue the monopolist; and if he or she succeeds can recover three times his or her loss of the profits.

In contrast, your bill would say to the small business person which lost his or her business and his or her livelihood that if he or she can successfully fund an expensive antitrust suit, he or she can recover only single damages and interest on those damages. Your bill also says that a distributor who has been forced into a resale price maintenance agreement and then is terminated can only recover single damages for lost profits.

Doesn't your detrebling proposal focus on small businesses who are victims of antitrust violations?

Mr. **Rule**. I do not think it does. You asked me a couple of questions, and I think a couple of other questions have to be asked. That is, do we want to deter procompetitive conduct? And I think the answer is no. Do we want to create incentives for bringing suits that perhaps are not designed to go after anticompetitive conduct? And I think the answer is no.

It strikes us that you have to draw a balance in the treble damage remedy. I am a very strong believer in treble damages in appropriate cases. I am a very strong believer, I think as the chairman knows, in strong deterrence for cartel-type behavior that raises prices to consumers. That is why we have urged stronger penalties under the criminal law. That is why we have urged treble damages for the Federal Government. That is why we want to retain trebling in cases involving overcharges or underpayments.

On the other hand, where you are talking about suits that may, in fact, not be motivated because of—or there is a tendency perhaps for these suits to be motivated for reasons other than maintaining competition, perhaps to go after conduct that is efficient or whatever. It seems to us that when that conduct is very likely to be—in fact, is probably going to be—detected that actual damages plus prejudgment interest from the date of the violation provides sufficient incentive, along with plaintiffs' attorneys' fees, for competitors, distributors and others to bring suit, but not so much as to provide an incentive for bad cases or to overdeter procompetitive conduct.

So it is drawing that balance that we are talking about. We are not talking about throwing overdeterrence. We are not talking about selling out small business. In fact, if anything, we want to spare small businesses from unnecessary strike suits, and we want to protect them when they are consumers or suppliers selling to a monopoly cartel or buying from a monopoly cartel. We want them to be protected, and that is why we are maintaining treble damages for them.

Senator **Metzenbaum**. The light is on; my time has expired. Senator Specter?

Senator **Specter**. Thank you very much, Mr. Chairman.

The first subject that I want to take up is the procedure that is used by the Department of Justice and the FTC on reviewing takeovers. We know the problem in this country today on takeovers. There is a merger mania. There are many considerations now pending before the Congress to limit takeovers, but one facet of existing law that puts the brakes to some extent is the issue of antitrust violations.

I want to take up the question in terms of the takeover effort by Beazer as to Koppers, as I outlined initially, and I want to take up a number of considerations on that:

First, the procedures used by the Antitrust Division of Justice and the FTC on ascertaining the facts; second, in the specific case here, whether there was good faith or the absence of good faith by the Justice Department in proceeding to a consent decree within 15 days, the precise limitation for the Hart-Scott-Rodino filing of materials; and, third, the issue of what review there is, if any, by the Attorney General of the United States himself on a matter of this sort in the context of the specific request by this Senator, a member of the Antitrust Subcommittee.

The factual information here, in a nutshell, involves a takeover by Beazer of Koppers, an effort to take over, which would result in a merger of two of the largest suppliers of construction materials in the country, with particular emphasis on Southern California. On March 3 of this year—so it is a very recent event; everything has taken place in the course of this month—Beazer filed under Hart-Scott-Rodino. There could not be any action taken for at least 15 days. Koppers, according to information provided to me personally—and I have looked into this in some detail with its counsel—was providing materials to the Department of Justice on Wednesday the 16th, the 17th, and the 18th. Then on the 18th, the Justice Department and Beazer filed a consent decree consisting of elaborate documents showing that Beazer and the Department of Justice had been engaged in extensive proceedings coming to that point. It just did not happen in the course of a few hours or perhaps even a few days.

Koppers then went into court, and the court issued a temporary restraining order, raising the implication that the court was dissatisfied with what Justice and Beazer had been undertaking.

Mr. Rule, let me start with you on the narrow question of good faith or bad faith. How can the Department of Justice enter into a consent decree on March the 18th, precisely 15 days after the 15-day period runs—you could not have done it a day sooner—at a time when you are negotiating with Koppers and Koppers is providing information, and the Koppers attorneys think that they are receiving a hearing, a fair hearing by the Department of Justice? And then suddenly they find that a consent decree is filed, showing that while Koppers was dealing with the Department of Justice, the Department of Justice was contemporaneously working it all out with Beazer?

Mr. RULE. Well, first of all, this is the first time that I can recall that the Government has been criticized for trying to do its job quickly and thoroughly. It seems to me that our responsibility is to do our job to protect the public interest and——

Senator SPECTER. We are not criticizing you for doing your job thoroughly. We are raising a question, and I am not criticizing you yet. I am raising a question so far.

Mr. RULE. OK. Well, let me say this: We had an unusually knowledgeable staff on this matter, because this staff had been involved from 1983 through 1985 in investigating a merger in the same geographic market involving the same kinds of products that were involved in the B&S-Koppers deal.

Senator SPECTER. Merger between the companies?

Mr. RULE. Between a couple of ready-mix—or actually hot asphalt manufacturers called the Industrial Asphalt Joint Venture. We sued them. As a result, the staff, I think, had talked to something like 63 companies and hundreds of individuals, had received numerous documents, became intimately familiar with the aggregate markets. The staff had also done——

Senator SPECTER. Aggregate market where?

Mr. RULE. In Irwindale, which is where the overlap is in this case. Irwindale, CA.

Senator SPECTER. Aren't there other markets at issue as to Beazer and Koppers?

Mr. RULE. We have looked at all the markets. The allegations that——

Senator SPECTER. Do you have that kind of detailed knowledge of all the markets from your prior immediate experience?

Mr. RULE. Of all the markets that Koppers has focused on, we do, because all the markets are, in effect, in Irwindale. They involve either aggregate cement or ready-mix concrete in the Los Angeles area, which are matters that this staff, in particular—these people, not just the Division—have investigated on several occasions, including not just the *Industrial Asphalt* case I mentioned, but other mergers and other types of investigations.

In fact, this staff had not too long ago reached a settlement in the *Industrial Asphalt* case that involved divestitures very similar to those that were contemplated in this consent decree.

Now, the Hart-Scott-Rodino filing came in on March 3. And, frankly, if we had had information on the second day, we could have settled it. There is no reason that you cannot do that and give an early termination.

Senator SPECTER. Why did you seek information from Koppers counsel then? If you knew the answers, why did you seek the information from Koppers counsel?

Mr. RULE. Koppers counsel came in, as I understand it, to indicate to us competitive problems, and we listened to them. And we invited Koppers to provide information. We talked to other customers and suppliers and based our decision on our knowledge of the industry.

Senator SPECTER. Well, isn't it true that Koppers had not finished supplying you the specific information that you had requested or they had offered to supply at a time when you went ahead with the consent decree?

Mr. RULE. Senator, if we felt that we did not have adequate information to reach our conclusions, we would not have proceeded. And I looked at this matter personally.

Senator SPECTER. You looked at the matter personally——

Mr. **Rule**. Yes.

Senator **Specter** [continuing]. Before the consent decree was entered into?

Mr. **Rule**. Yes, before, because I signed the complaint, as I always do, and approved the terms of the consent decree. So I certainly take full responsibility for the matter. I am very impressed with the competence of the lawyers and the economists who worked on the matter. They are knowledgeable.

But the fact that a company that has indicated opposition to a merger based on grounds other than competition, you know, wants to proceed very slowly in terms of providing information, that is fine. That is their prerogative. But if we had——

Senator **Specter**. Proceed slowly, you say?

Mr. **Rule**. We invited Koppers to provide us information. The first time we got information from them was when they filed for a TRO in the Central District of California on March 25.

Senator **Specter**. Koppers counsel has told me that they provided information to you on March the 14th, 15th, 16th, and 17th. Is that incorrect?

Mr. **Rule**. Well, as I understand it, we had talked to them, and they had said they were going to provide information. We said fine; and, in effect, if it got there——

Senator **Specter**. So you had talked to them on the 14th, 15th, and 16th?

Mr. **Rule**. I am not sure of precisely the dates on which we talked to them. I think we had talked to them earlier.

Senator **Specter**. That is before they filed the TRO.

Mr. **Rule**. I think we had talked to them earlier. But as I understand it, they provided no detailed information on the alleged difficulties with the divestiture, for example, until the TRO. We had gotten some information. They had indicated that they were going to provide the information, I think, the week after the 15 days ran. We felt we had adequate information. The parties, in fact, when they filed the consent decree, came in and said: "Look, this is an important deal to us for reasons that have nothing to do with antitrust. We want to eliminate the antitrust problems."

We, in effect, had leverage to get what we felt was a good divestiture, and we got what was a good divestiture. But we only dealt with those markets where we felt there was a competitive problem. We are not in the business of taking sides on takeovers, and we are not in the business of taxing people for merging. We are only in the business of protecting the public interest from anticompetitive mergers, and that is what we did.

Once we had made the decision that we had solved the competitive problem, we felt it was best for us to put before the court a settlement that solved our problem, and stand back and let market forces, the securities laws, and all the other factors that come into play in determining who is going to win a tender offer and how that all is going to come out, play out without us being in the middle.

I am confident that we did a very thorough and very professional job. The matter is now before Judge Real in California. He has to undertake the Tunney Act proceeding. Koppers has intervened in that matter. The State attorney general in California has intervened in that matter. We will listen to their comments and the comments of anyone else during that 60-day period. And if we are incorrect, if there is a problem with the divestiture, then we will look at it again and we will go back in.

But I am confident that we did a thorough, professional job, and I am very proud of the staff and the job they did.

Senator SPECTER. Well, my time is up. Senator Metzenbaum says I can ask one more question.

Didn't Judge Real's granting a temporary restraining order demonstrate that he disagreed with you, with your conclusion that you had done a thorough, comprehensive, fair job?

Mr. RULE. Again, I do not purport to speak for Judge Real, and the matter is under——

Senator SPECTER. Well, he did issue a temporary restraining order, didn't he?

Mr. RULE. Sure.

Senator SPECTER. I will pick it up on the next round, Senator.

Senator METZENBAUM. Mr. Rule and Mr. Oliver, I am going to ask you to accommodate two witnesses who have to get away at 11 o'clock. Would it be an imposition on you to ask if you would temporarily step aside so we may hear Mr. Ong, chairman of the board of B.F. Goodrich on behalf of the Business Roundtable, and John Satagaj, Small Business Legislative Council? Would you mind doing that?

Mr. RULE. Senator, if you ask, we will only be more than happy to do it, I am sure, at least speaking for me.

Mr. OLIVER. Certainly.

Senator METZENBAUM. Thank you very much. I appreciate it. I am sure Mr. Ong and Mr. Satagaj appreciate it as well.

Mr. Ong, I know that you are here. I saw you before. You know our 5-minute rule.

Mr. Ong, we are happy to hear from you, sir.

STATEMENT OF JOHN D. ONG, CHAIRMAN OF THE BOARD, B.F. GOODRICH CO., ON BEHALF OF THE BUSINESS ROUNDTABLE, AKRON, OH

Mr. ONG. Thank you, Mr. Chairman. I also thank Chairman Oliver and the Assistant Attorney General for their courtesy in allowing me to appear somewhat our of order.

My name is John Ong. I am here and very pleased to be able to testify on behalf of the Business Roundtable. In my written statement, I have set forth our views in some detail on the provisions that are under review today in S. 635 and S. 1407, in this brief oral statement, I would just like to address certain fundamental concerns that cause us to have those views.

We are not dealing today with matters of substantive antitrust law. We are dealing with civil remedies that are available to enforce the antitrust laws, and principally with the remedies that are available to private parties. I suspect we all would agree on a general statement of what those remedies should do. We want to deter people from violating the law; we want to provide fair compensation for those who are injured; and we want to provide sufficient incentives for people to bring meritorious cases without at the same time encouraging cases that are not meritorious.

The controversy arises, of course, because these objectives may to some extent be mutually inconsistent, and judgments may differ about the appropriate balance of remedies. I would like to provide the Roundtable's perspective on these matters.

First of all, we believe the so-called claims reduction provisions of S. 635 provide an appropriate balance. As S. 1300, these provisions passed the full Judiciary Committee, as has been said, by a 16-to-2 vote a couple of years ago. They maintain the deterrent effect of joint and several liability. In fact, they really enhance deterrence because the wrongdoer is far less likely to escape with a nominal settlement or avoid a suit altogether if this provision becomes law.

These provisions do not interfere with the plaintiffs' ability to secure full compensation. They do not impose any burdensome procedures. They do, however, make it impossible for a plaintiff to employ unfair whipsaw settlement tactics that put progressively increasing pressure on those defendants who would really like to go to trial.

Some people have said that we need not be concerned about fairness to people who fix prices. But as Senator Leahy pointed out in the committee report on this proposal 2 years ago, that argument is, and I quote, "based on a false premise that all of the allegations in an antitrust complaint are true." People accused of price-fixing, like anyone else, are entitled to their day in court, and they cannot get that day if the risks of proceeding to trial are prohibitive.

We also believe the proposals in S. 635 for treble damage reform are fair. These proposals would continue treble damage recoveries for people who can prove they were either overcharged or underpaid as a result of antitrust violations. These cases usually involve a price-fixing or market-rigging scheme, conduct that people should know is wrong and, therefore, appropriately subject to a punitive remedy.

In addition, this is conduct that often is concealed, and the risk of non-detection or the delay in exposure may justify treble damages, both to maintain proper deterrence and to ensure full compensation to those injured.

The situation is completely different if the case involves conduct that is open and above board and so equivocal in its competitive impact that you do not know whether it is illegal until the full rule of reason trial has been concluded. Cases where people sue for lost profits are much more likely to fall in this category. Treble damages are unfair in this situation, and they are not needed for deterrence or for adequate compensation.

S. 635 recognizes the distinction between different kinds of antitrust claims and, it seems to us, strikes a fair balance.

Finally, there are certain areas of antitrust enforcement where private activity may actually subvert public competitive policies. This risk is particularly high if private parties are freely given standing to attack mergers of their competitors. For that reason, we oppose section 7 of S. 1407 which would overturn the *Cargill* case.

There are good mergers and there are bad mergers. We all know that. Bad mergers can create market power and lead to higher prices in a particular market. Competitors are not motivated to attack those mergers because they tend to benefit all competitors with the higher prices that result. Good mergers, on the other hand, create efficiencies and lead to lower prices. There are the mergers that competitors are particularly likely to challenge, and a challenge is often all that is needed to block a deal since most mergers are time-sensitive.

This problem of perverse incentives in merger law enforcement was resolved by what we feel was a very carefully balanced opinion of Justice Brennan for the 6–2 majority of the Court in the *Cargill* case. Competitiors can still sue to block a merger, but they have to show that the merged entity is likely to drive them out of business by predatory conduct that violates the antitrust laws. This decision strikes a fair balance, and it should be left alone, in our judgment.

We really have to look to the Federal Government for implementation of a national merger policy, and there are political remedies available if there is a consensus that Federal enforcement is not adequate or sufficiently vigorous.

Similar considerations of balance underlie our opposition to treble damages for the United States and the extension of the Tunney Act, the other two provisions of S. 1407 that are under review here today. The Federal Government does not need the special incentives that treble damages can provide. At the same time, however, the Federal Government should retain its own prosecutorial discretion. There is no logical reason why a prosecutor who can refuse to bring a case in the first place should not have the discretion to dismiss a case that has been, in his judgment, improvidently brought.

Thank you. I will be happy to answer your questions.

[The prepared statement of Mr. Ong follows:]

Statement Before the
Committee on the Judiciary
United States Senate

Hearing on S. 635 (§§ 201-17) and S. 1407 (§§ 3, 6, 7)

by

John D. Ong

On Behalf of The Business Roundtable

March 31, 1988

STATEMENT OF THE BUSINESS ROUNDTABLE CONCERNING VARIOUS PROVISIONS OF S. 1407 AND S. 635

My name is John D. Ong. I am Chairman of the BF Goodrich Company. I am also Chairman of the Business Roundtable's Antitrust and Government Regulation Task Force.

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and type of business. The Roundtable was founded in 1972 in the belief that business executives should take an increased and open role in continuing debates about public policy. The companies represented by the Roundtable are substantial producers and purchasers of goods and services. Many Roundtable companies have been involved in antitrust cases on both the plaintiff and the defendant side. They have received some of the largest treble damages awards and settlements in antitrust history. So, contrary to popular belief, the Roundtable's members do not view antitrust reform solely from a defendant's perspective.

The Roundtable appreciates this opportunity to express its views on the remedial provisions in the Clayton Act. We believe that there is a broad consensus on the basic objectives of antitrust remedies, which should be designed to provide fair compensation, to deter potential defendants from violating the law, and to give potential plaintiffs appropriate incentives to enforce the law in private actions.

Achievement of these objectives requires an appropriate balance of remedies. For these reasons, it is useful to consider a variety of proposals together, rather than in isolation. Proposals that are unacceptable if considered in isolation might be acceptable if considered in the context of other proposals. We also have to recognize, however, that each individual proposal raises important and complex issues, which have to be considered with care. (Sections 203-04 of S. 635 have already been considered and approved by the Judiciary Committee as S. 1300, but the other proposals before the Committee today have not had the same level of attention.) This single statement can only provide a broad overview, and we trust that other witnesses will be able to provide the Committee with perspectives in greater depth.

The Roundtable's position may be summarized as follows. We support Sections 203-04 of S. 635 (claim reduction). These sections are designed to eliminate the risk of unfair "whipsaw" settlement tactics in antitrust litigation; they have strong bipartisan support; and as S. 1300 they passed the Judiciary Committee by a 16-2 margin in 1986. We also support Sections 211-17 of S. 635 (treble damages reform) 1/

1/ On May 21, 1986, The Business Roundtable submitted a Statement to the Judiciary Committee in support of these proposals, when they were contained in S. 2162.

because defendants should not be subject to punitive treble damages for conduct that they could not know was illegal before the case has been decided.

The Roundtable opposes Section 3 of S. 1407 (treble damages for injury to the United States) because the Government does not need the special incentives of a punitive remedy. We oppose Section 6 of S. 1407 (Tunney Act extensions) because it intrudes unreasonably on Executive responsibilities and creates unnecessary burdens. We also oppose Section 7 of S. 1407 (standing for competitors to challenge mergers) because it will encourage litigation in aid of anticompetitive objectives and reverse a carefully balanced decision of the Supreme Court.

I. S. 635 SHOULD BE PASSED

A. Section 203 Claim Reduction

The Roundtable supports passage of this legislation to eliminate unfair "whipsaw" settlement tactics. For many years the antitrust community has been concerned with a serious inequity that results from the application of joint-and-several liability to antitrust cases. Indeed, in 1981 the Supreme Court recognized the problem and invited Congress to correct it. 2/ In the interim, discussions have occurred, various

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2/ In Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630 (1981), the Supreme Court ruled definitively that

[Footnote continued]

bills have been proposed to address the problem, and this Committee has had an opportunity to study it. Section 203 of S. 635 represents the culmination of these debates and discussions, and it provides the most sensible solution. It is identical to S. 1300, which was introduced in the 99th Congress and approved by an overwhelming margin (16-2) in this Committee on May 8, 1986. Passage by Congress is long overdue.

In order to analyze Section 203, it is useful to review the problem it seeks to redress. Under existing law, a single antitrust defendant can be liable for the treble damages attributable to an entire industry. This rule of joint liability normally does not lead to an unjust result if all of the significant companies in an industry are sued at the same time and defend the action to the end, because the defendants will typically work out a sharing agreement to reasonably allocate damages that may be awarded. If, however, individual defendants settle as the case proceeds, the remaining defendants are subject to increasingly severe settlement

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2/ [Footnote continued]

defendants in antitrust cases could not enforce rights of contribution against each other; therefore, a single company could be liable for the damages caused by all companies in an entire industry. The Court recognized that this non-contribution rule could lead to harsh results, but concluded that Congress had to solve the problem.

pressure because only the settlement amounts, not the total damages attributable to the settling defendant, are "carved out" of an overall damage recovery.

This escalating settlement pressure can be illustrated by a simplified, but realistic example. Suppose there is a claim that antitrust violations have occurred in an industry with five companies, each with a 20% market share. Suppose also that the estimated damages, if proven, would amount to one dollar for each market-share point. The total estimated treble damages would then be 3 x 100 or $300, and each defendant's proportionate share would be 3 x 20 or $60. If three defendants settle for full single damages ($20 apiece), the total damage exposure would be reduced by only $60 and the remaining two defendants are exposed to liability for $240 or $120 apiece. If four defendants settle, total liability exposure for the single remaining defendant is $220, or eleven times the original estimated single damages. The situation will be even worse if, as often happens, other defendants settle for less than single damages, or if the remaining defendant's (or defendants') market share is less than the hypothetical 20%.

Even if the remaining defendant(s) are convinced of innocence, the litigation exposure is so large that there is no practical alternative to capitulation. 3/ This is the settlement "whipsaw" and there is a general consensus that it is unfair. 4/ Section 203 of S. 635 effectively eliminates the unfairness.

Under Section 203, if a plaintiff settles with a defendant, the potential joint liability of the other defendants is reduced by the full amount of the damages attributable to the settling defendant -- regardless of the actual settlement amount. Further, if a plaintiff in an action based on a conspiracy among competitors, fails to join any party whose sales or purchases would otherwise be included in a calculation of damages, the court treats that party as a settling defendant, so long as it practically could have been sued. Thus, Section 203 eliminates the whipsaw problem in horizontal conspiracy cases where a plaintiff declines to sue all potentially liable defendants. 5/ Finally, Section 203

3/ In order to induce capitulation by all defendants, a plaintiff may settle with the first defendant on relatively favorable terms, the next for a higher amount, and so on. This settlement tactic progressively increases the in terrorem effect and also provides an ongoing fund for prosecution of the litigation.

4/ The Committee Report on S. 1300 recites specific instances of the whipsaw at work. S. Rep. No. 99-320, 99th Cong., 2d Sess. 6-10 (1986).

5/ See, id. at 9-10.

allocates damages in horizontal price-fixing cases "on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments." This provides a predictable basis for allocation that will enable the parties to evaluate the effects of settlements and avoid protracted judicial inquiries into matters of relative fault.

Section 203 of S. 635 effectively solves the whipsaw problem while offering many other advantages that include the following:

(1) It preserves the deterrent effect of joint-and-several liability and does not impose new collection burdens on plaintiffs. A plaintiff can still pursue any individual defendant for the full damages awarded.

(2) It enhances deterrence by providing a strong incentive for plaintiffs to sue all wrongdoers. People will know that they are more likely to be sued if they violate the law.

(3) It will not complicate litigation. The amount carved out of the total potential recovery because of a settlement or a failure to sue will normally be based on a simple market-share allocation.

(4) It does not reduce the total amount that a plaintiff can potentially recover. A plaintiff can still recover full treble damages from any defendant, but if a plaintiff chooses to extend particularly favorable settlement terms to some defendants it cannot force the other defendants to make up the difference.

The Roundtable supports Section 203 of S. 635 as a clearcut, effective, and fair solution to the whipsaw problem. We also support Section 204, which provides that the change shall not apply to presently pending cases. The proposal is an appropriate response to the Supreme Court's challenge; it has already been recommended by this Committee; and it should be passed.

2. Section 212 - Treble Damages Reform

The Roundtable supports reform of the treble damages remedy because it is fundamentally unfair to impose punitive damages sanctions on conduct that is determined to be illegal only after extended judicial proceedings.

There is a strong and general consensus that the treble damages remedy needs to be reformed. This extraordinary remedy was originally established almost a century ago to encourage private enforcement of the antitrust laws. 6/ It was established in a very different social and economic climate than we face today. There have been dramatic changes since that time in our understanding of the economic consequences of business behavior and in the procedural devices available for prosecution of antitrust claims. Section 4(a) of the Clayton Act should be amended to reflect those changes.

When the treble damages remedy was established, Congress was concerned about genuine cartels or "trusts," and the anticompetitive consequences of their conduct were obvious. 7/ Because Congress feared that small businesses injured by anticompetitive conduct might be reluctant to challenge the conduct of these trusts, it provided for multiple damages to encourage private enforcement. 8/

The world has changed a great deal since 1890. Private enforcement continues to be viewed as an important adjunct to government enforcement, and cases against genuine cartels continue to be brought. Increasingly, however, the

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6/ Treble damages were first provided in Section 7 of the Sherman Act, passed in 1890, which was superceded by Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), passed in 1914.

7/ See, e.g., United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

8/ See, e.g., 21 Cong. Rec. 2568-70 (1890).

Sherman Act has been applied to conduct that is not as clear-cut and obviously anticompetitive as the conduct that concerned Congress when enacting the Sherman Act. Likewise, conduct that was once thought to be anticompetitive and thus illegal, is now recognized as valid and procompetitive. 9/

Moreover, the balance of litigation power has shifted as well. Antitrust cases no longer involve only small businesses pitted against giant industrial companies. On the contrary, major corporations are now plaintiffs in antitrust cases, and we also see many small businesses as defendants. Plaintiffs have the ability to aggregate their claims in massive class actions, and they can take advantage of liberal discovery rules. 10/

9/ For example in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Supreme Court held that vertical territorial restraints were per se illegal. Only ten years later, however, Schwinn was overruled by Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), in which the Court recognized that while vertical restraints may limit intrabrand competition, they actually promote interbrand competition and should therefore be analyzed under the rule of reason. These developments highlight the obvious fact that the antitrust laws are imprecise, and even experienced antitrust lawyers often have difficulty advising clients about the possible consequences of their conduct.

10/ In addition, of course, plaintiffs recover attorneys' fees if they win, whereas defendants pay their own fees whether they win or lose.

Section 212 of S. 635 seeks to address these changed circumstances, but still preserve incentives for effective private enforcement. Under this proposal, buyers forced to pay higher prices (or sellers who are underpaid) would still be entitled to obtain treble damages. Treble damages therefore remain available to parties damaged by the most harmful anticompetitive conduct, such as price-fixing or bid rigging. This is also the kind of conduct that defendants are most likely to know is wrong ahead of time.

However, private plaintiffs seeking to recover lost profits would only recover actual damages. Typically, actions for lost profits are based on conduct which is equivocal in its competitive effect, and defendants do not have the same consciousness of wrongdoing. It is unfair to apply to conduct of this kind the same punitive remedy that is designed for deterrence of clearly harmful conduct. In fact, this perceived unfairness may actually have an undesirable effect on the substantive law that is applied. 11/

11/ See Calkins Summary Judgement, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Georgetown L.J. 1065, 1088 (1986).

Plaintiffs who can assert valid claims for lost profits will still have adequate incentives to bring suit 12/ because they can recover full compensatory damages, including litigation expenses and prejudgment interest on their actual damages from the date of injury. The Roundtable does urge, however, that the bill be modified to provide that prejudgment interest runs from the date of the complaint. This should yield adequate compensation since single damage actions will involve practices that are open and subject to prompt challenge. The change would also be consistent with existing law on prejudgment interest, Clayton Act §§ 4(a) & 4a, 15 U.S.C. §§ 15(a) & 15a (1982).

Section 212 of S. 635 recognizes that it is undesirable to provide extraordinary incentives for antitrust litigation over conduct that may well be procompetitive, and that it is unjust to subject defendants to treble damages penalties for conduct that they could not know was wrong before a suit is concluded. Section 212 is an important step in this country's efforts to modernize the antitrust laws to take into account the competitive realities of today, without sacrificing

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12/ There is no factual support for the claim that Section 212 will unduly discourage private damage actions. The securities laws and the common law of business contracts, for example, do not provide for treble damages, but there is no shortage of litigation in these areas, even though cases may be complex.

the goals and objectives of antitrust in general. The Roundtable supports Sections 211-17 of S. 635. 13/

II. S. 1407 SHOULD BE REJECTED

A. Section 3 - Treble Damages For The Government

The Roundtable is opposed to granting the Government the right to recover treble damages for antitrust injuries that it may suffer in its proprietary capacity. The reason is that the Government does not need the special incentives provided by this extraordinary remedy.

Under the current law, if the United States is "injured in its business or property by reason of anything forbidden in the antitrust laws" it may sue for actual damages only. 14/ Private litigants, of course, may recover treble damages. The disparate treatment of the U.S. Government and private plaintiffs is not an historical anomoly, however.

The legislative history behind 15 U.S.C. § 15a indicates that Congress' disparate treatment of private parties

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13/ Section 213 provides that the United States can recover treble damages to the same extent as private litigants. This should only be considered in the context of broad treble damages reform. Section 214, which provides for prejudgment interest in State *parens patriae* actions, should be modified as discussed. Sections 215 and 216, which provide for defendants' attorneys' fees when frivolous actions are brought, and Section 217, which provides for prospective effect, also have merit.

14/ 15 U.S.C. § 15a.

and the Government as antitrust plaintiffs was calculated and well-reasoned. As the Senate Report explained:

> It should be noted, however, that the bill would grant to the Government the right to recover only actual, as distinguished from treble damages. This difference in treatment is a recognition of the difference in the position of the United States and of "persons" in this connection. Both may recover their actual damages. The damages of "persons" are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings.

Senate Report No. 619, *reprinted in* 1955 U.S. Code Cong. & Admin. News 2328, 2330 (emphasis added).

The rationale for limiting the Government to single damages in an antitrust suit is just as valid today. The Government, unlike private litigants, has a wide array of financial resources and investigative tools at its command. 15/ In addition, the Government has a legal

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15/ For example, the Government has the power to convene grand jury investigations. The Government can also issue civil investigative demands on any person it believes "may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation," even if no civil or criminal proceeding has been initiated. 15 U.S.C. § 1312.

obligation to utilize its resources to enforce the antitrust laws, while private parties are not so obligated. Treble damages are therefore not needed to motivate the Government.

Treble damages for private parties may also be justified as necessary to ensure full compensation, in light of the characteristic delays involved in the detection of antitrust conspiracies and the prosecution of antitrust lawsuits. The Government does not need treble damages to make itself whole because it can get prejudgment interest if necessary for adequate compensation (15 U.S.C. § 15a), whereas a private party must show dilatory tactics by the defense (15 U.S.C. § 15(a)).

Section 213 of S. 635 does put Government damage actions in parity with private actions, and this means the Government could get treble damages in some circumstances. It is one thing, however, to advance the proposal as part of an overall effort to rationalize the treble damages remedy, and another thing to advance it without any balancing proposals. Standing alone, the proposal does not warrant favorable Committee action.

B. Section 6 - Court Examination of Dismissals and Decree Modifications in Government Antitrust Suits

The Roundtable opposes this extension of the so-called Tunney Act as an unnecessarily burdensome procedure that interferes with the normal discretion of Executive authorities. Section 6 of S. 1407 would extend the procedures of the Tunney Act, 15 U.S.C. § 16, to dismissals and modifications of consent decrees in civil proceedings brought by the United States. Since prosecutors have discretion to bring or not to bring cases in the first place, it is illogical to say that they cannot thereafter exercise discretion to dismiss cases that have been improvidently brought. Moreover, many decree modifications are too minor to require public comment.

As the law stands today, the United States must follow elaborate public notice and comment procedures when it submits "any proposal for a consent judgment . . . in any civil proceeding brought by or on behalf of the United States under the antitrust laws." 15 U.S.C. § 16(b). Before any proposed consent decree is approved, the court must make a public interest determination, 15 U.S.C. § 16(e) and (f). The Government is not required to follow this process, however, if it modifies a pre-existing decree or dismisses a case outright. Section 6 of S. 1407 would extend the same procedures of the Tunney Act to these Government actions.

The Business Roundtable does not oppose an application of the Tunney Act to significant modifications of pre-existing consent decrees. In fact, the Government has often followed the Tunney Act's requirements in proposing modifications. However, while the Tunney Act's procedures may be appropriate for substantive modifications of pre-existing consent decrees, they would only cause undue delay and expense if automatically applied to mere technical adjustments. The Roundtable therefore agrees with concerns previously expressed by the Justice Department, 16/ and supports extension of the Tunney Act to consent decree modifications only if courts are granted flexibility to apply the Act in light of the circumstances surrounding each proposed modification. This means that non-material changes could be approved upon agreement between the Government and a private party, without invoking burdensome notice procedures.

For constitutional and pragmatic reasons, however, the Roundtable opposes application of the Tunney Act to outright dismissals of civil antitrust actions brought by the Government. First, such an extension would require the courts

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16/ Ronald G. Carr, Some Observations on the Tunney Act, 52 Antitrust L.J. 953, 955-56 (1983). Ronald Carr served as Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice when he authored this article and presented the Department's viewpoints.

to review a matter which no longer constitutes an actual case or controversy, and would thereby raise serious questions under Article III of the Constitution. Once the Government decides to dismiss an action against a defendant, no controversy exists between the two as to the propriety of the dismissal. Moreover, unlike a consent decree which contemplates ongoing judicial scrutiny, a court retains no jurisdiction over a dismissed case. The judicial function is therefore exhausted.

An extension of the Tunney Act to dismissals would also do violence to the constitutional doctrine of separation of powers. Section 6 of S. 1407 directs the courts to refuse to enter a requested dismissal if they find it is not in the public interest. Section 6 does not instruct the courts to look for an abuse of prosecutorial discretion, but instead to substitute their judgment for the Government's judgment on whether a prosecution should be continued. A more blatant judicial intrusion into the executive's province can hardly be imagined. 17/

Indeed, courts are ill-suited to make the type of determinations mandated by Section 6. Prosecutors have discretion to sue or not to sue in the first place because they

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17/ *See*, *e.g.*, McDavid, Sankbeil, Schmidt & Brett, *Antitrust Consent Decrees: Ten Years of Experience Under the Tunney Act*, 52 Antitrust L.J. 883, 991 (1984).

are best able to evaluate the strengths and weaknesses of a case in light of available resources and other cases that might better merit utilization of these resources. Prosecutors will typically know even more about a case that has already been brought, and it makes no sense to deprive them of discretion at a time when they may be in an even better position to exercise it. A court could acquire comparable knowledge of the facts of a particular case only after a full inquiry that would consume the public resources which the dismissal is intended to save, and a court would never be in a position to evaluate a particular case in the context of other cases that compete for limited public resources.

For these constitutional and pragmatic reasons, the Roundtable urges this Committee to reject any extension of the Tunney Act to outright dismissals. In addition, the Roundtable recommends that any extension of the Tunney Act to modifications of existing consent decrees provide the courts with some flexibility to avoid the Act's strict procedural requirements in appropriate cases.

C. Section 7 - Standing for Competitors to Attack Mergers

The Roundtable opposes Section 7 of S. 1407, which would encourage litigation by business rivals for anticompetitive purposes. This provision evidences an incredible indifference to the real danger that competitors will try to stop efficient mergers because they would prefer to avoid hard competition.

Section 7 effectively overrules Cargill, Inc. v. Monfort of Colorado, Inc., 107 S.Ct. 484 (1986). Mr. Justice Brennan's majority opinion (6-2) in Cargill is a carefully reasoned and limited decision which actually promotes, rather than hinders, competition.

Experience has taught us that the antitrust laws are sometimes used as a weapon by businesses to thwart the competitive behavior of their rivals. Competitors who sue are not concerned with national antitrust policy; they may sue to reduce competition or to insulate themselves from the effects of successful competition by claiming it is unfair or predatory. 18/ In the case of mergers, competitors fear and are motivated to attack the very mergers favored by antitrust policy - those that are likely to result in genuine efficiencies and lower prices. 19/ They are not likely to

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18/ See, e.g., Austin, Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy, 78 Duke L.J. 1353 (1978) and Baumol & Ordover, Use of Antitrust to Subvert Competition, 28 J. L. & Econ. 247, 254 (1985).

19/ In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487 (1977) the Supreme Court noted that "(e)very merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account, it has condemned them only when they produce anticompetitive effects."

attack mergers that are of greatest concern -- those that will create market power and lead to higher prices -- because they will benefit from higher prices. For these reasons, merger law enforcement is generally best left to the federal antitrust authorities, not competitors.

Section 7 of S. 1407 would facilitate the use of antitrust litigation for anticompetitive purposes. Not only could competitors manipulate the antitrust laws to attack mergers that really promote efficiency and lower prices, but competitors could oftentimes block a merger solely by initiating suit. 20/ Even if courts do ultimately sanction a merger with procompetitive effects, the time consumed by a judicial resolution of any challenges could prove fatal to the merger. Most mergers and acquisitions are time-sensitive transactions. Once a transaction is subject to the unpredictable delays inherent in an antitrust proceeding, its economic viability must be re-examined. 21/ In many cases,

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20/ A study by the Antitrust Section of the American Bar Association found that plaintiffs who wish to prevent mergers or acquisitions frequently achieve their objectives merely by filing suit and obtaining preliminary relief. Most actions never proceed to trial on the merits. ABA Antitrust Section, Mergers and the Private Antitrust Suit: The Private Enforcement of Section VII of the Clayton Act Law and Policy 56-58 (Monograph No. 1) (1977).

21/ As Rebecca Schneiderman noted in Preliminary Relief in Clayton Act Section 7 Cases, 42 Antitrust L.J. 587, 588-89

[Footnote continued]

this means that consumers will ultimately be deprived of the benefits of a procompetitive merger.

The Cargill case is consistent with the broadly supported principles of the Hart-Scott-Rodino Act of 1976. The Hart-Scott-Rodino Act ensured that the Department of Justice and the Federal Trade Commission had the opportunity to review all significant mergers in advance. In the course of that review, these antitrust agencies can and do solicit the views of other interested parties, including competitors. Competitors frequently can supply useful information about the likely impact of the merger, but the antitrust agencies are best able to weigh that information and distinguish between public concerns and those that are purely private. Moreover,

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21/ [Footnote continued]

(1973):

> [M]ergers occur in a dynamic economic context in which the court has control over only a small part of the situation. For this reason it is often difficult to maintain the status quo. If the court grants a preliminary injunction, the merger frequently is abandoned; the plaintiff gets his relief without a hearing on the merits. The court can preserve the separateness of the merger partners, but it cannot hold static the economic circumstances that made the merger attractive to the parties as a business decision.

the Hart-Scott-Rodino law implicitly recognizes that timing is critical in merger transactions and imposes strict time limits on the process of review. This carefully balanced statutory scheme will be undercut if Cargill is overruled and private parties, with a private agenda, are freely allowed to block a merger that has survived the mandated public scrutiny.

Cargill does not preclude antitrust suits by competitors to enjoin a merger that threatens injury which the antitrust laws exist to prevent. A competitor who can demonstrate a genuine threat of predatory conduct enjoys standing to enjoin a merger. 22/ Thus, Cargill effectively promotes competition because it preserves standing for competitors who challenge anticompetitive mergers and it denies standing to competitors motivated by anticompetitive goals. For these reasons, we support the Cargill decision and urge the Committee to reject Section 7 of S. 1407.

CONCLUSION

It is apparent that some of the proposals under consideration at this Hearing are prompted by dissatisfaction

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22/ See, e.g., Phototron Corp. v. Eastman Kodak Co., 54 Antitrust & Trade Reg. Report 374 (March 3, 1988) in which the court found that the plaintiff had standing to challenge a proposed merger because the plaintiff established a credible threat of predatory conduct by the merged entity.

in some quarters over the antitrust enforcement policies of the current Administration. Expanded judicial scrutiny of modified consent decrees and dismissals (S. 1407 § 6) and expanded private remedies against mergers (S. 1407 § 7) will inevitably diminish the ability of any Administration to establish antitrust policy. We believe that it is generally unsound to change laws in reaction to the policies of an individual Administration -- or, for that matter, in reaction to individual decisions of lower federal courts. The reason is that executive policies and judicial decisions which do not withstand the test of time can and will be reversed without the need for special legislation. 23/ Congress is not the only branch of government that is ultimately responsive to the public interest. At the very least, there should be some demonstration of a compelling need for Congressional action, and none has been forthcoming. We therefore oppose these provisions.

Other modifications of antitrust civil remedies under consideration today do not involve a similar intrusion into executive policy responsibilities, and it is appropriate that these items be considered. I think we all would agree on

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23/ Even Supreme Court decisions are reversed or modified when they are clearly wrongheaded. See n.9 *supra*.

ultimate objectives, and I think we all would agree that an appropriate balance of remedies is necessary to meet these objectives. We submit that the sections of S. 635 now before the Committee are balanced proposals and are worthy of support.

Senator METZENBAUM. Thank you, Mr. Ong. I think I will take the questions separately.

My first question is: How come Goodyear has had callers and Firestone has had callers and B.F. Goodrich has not had any callers yet? Are you impregnable?

Mr. ONG. We are not impregnable, and we could, perhaps, feel spurned. But we are not too unhappy about that, Senator.

Senator METZENBAUM. I did not think that you would be. As an Ohio company, I am happy to see that. But I just wonder when the knock on the door is going to come. My guess is you have anticipated it and probably done some things about it, which I am not sure I would agree with or disagree with. But we will see.

Let me ask you some questions. The Business Roundtable and other business groups work very closely with this committee on legislation concerning vertical price-fixing. I would like to take this opportunity to publicly commend you for playing such an important and responsible role on that issue. Although major business groups helped work out the compromise on S. 430, others who did not participate in the compromise now object to the bill.

I would like to review with you some of their claims and get your response to them.

First, some groups are claiming that S. 430 would overturn or seriously undermine previous Supreme Court decisions like *Sylvania*, relating to non-price vertical restraints, and *Colgate*, relating to the protection of unilateral conduct. Do you agree with this claim?

Mr. ONG. Senator, as you know, the Roundtable initially opposed S. 430. But as you have just said, we worked with you and your colleagues and staff on changes in that bill during the committee process. And we are not opposing it in its amended form.

It is our opinion, based upon the language of the bill as it stands and upon the committee's very fine report, that it would not have the effect, if enacted into law, of overruling the *Sylvania* line of cases so far as non-price vertical restraints are concerned.

Senator METZENBAUM. Thank you very much.

Others challenge the bill on the ground that it would condemn as illegal conduct that is current legal. Do you read the bill as doing this?

Mr. ONG. I am not familiar with those particular allegations. I think that we feel the bill, as it is crafted now, is consistent with the *Monsanto* decision. We do not believe from the language of the bill and the committee report that it overturns or would tend to overturn the *Sylvania* or *Colgate* doctrines.

We recognize there are, of course, some people, including people in the business community, who feel that the bill would have some very broad and unintended effects in terms of antitrust litigation. For that reason we urge the committee, as this bill goes to the Senate floor and perhaps eventually into conference with the House, to preserve the language that has been embodied in it at this point, and the language and the concepts that are incorporated in your committee's report, through the process of floor debate and conference.

I think this would assure us that some of the perhaps unintended effects that others are worried about would not, in fact, take place.

Senator **Metzenbaum**. Some groups argue the bill would subject the manufacturer to liability under the antitrust laws if it terminates a discounter for legitimate non-price reasons. Does the Business Roundtable believe that the bill would subject a company to liability in these circumstances?

Mr. **Ong**. The language of the bill makes it clear, Senator, we think, that a dealer cannot get to a jury merely by showing that people have complained about its prices or his prices. There has to be some additional evidence that the plaintiff puts in that shows a causal connection between whatever price complaints there were and the termination of the dealer. So to that extent, I would answer your question in the negative.

I think I would make a point here, Senator, that I believe is important. While, as I said, the Roundtable does not oppose this bill in its current form, and we do not believe it has some of the effects that you have mentioned, I think we still would conclude that it is likely that this bill, if enacted into law, would result in some increase in antitrust litigation. And we feel that the risks which businessmen and corporations are subjected to in that regard would be greater if that happens, and I think that would make it all the more important that the committee also press forward with the treble damage reform provisions that are included in S. 635 about which I have already testified.

I think that the passage of S. 430, if that occurs, just makes the passage of those provisions of S. 635 more urgent, more important.

Senator **Metzenbaum**. Other opponents argue that the existence of one letter in the file complaining about a discounter's price would lead to liability under S. 430. I think that is rather preposterous. Do you agree?

Mr. **Ong**. I do not think I can either agree or disagree with that one. That is a pretty precise evidentiary point, and I really cannot express an opinion as to how the passage of S. 430 would affect such a fact situation one way or the other.

Senator **Metzenbaum**. Finally, some of the business groups have claimed the bill would result in a major increase in frivolous antitrust cases. Do you agree with that?

Mr. **Ong**. Frivolity, of course, is a matter of semantics. As I have said, I think there is a likelihood that the bill, if passed, would result in some increase in antitrust litigation. I would not care to characterize that as frivolous or otherwise.

Senator **Metzenbaum**. Let me come back to the bill while I still have a few minutes left.

You oppose granting the United States the right to recover treble damages on the grounds that the purpose of the treble damage remedy is to encourage private enforcement of the antitrust laws. Doesn't the existence of a treble damage remedy also deter illegal behavior? And wouldn't permitting the Government to recover treble damages act as an additional deterrent?

Mr. **Ong**. I cannot argue that it would not, Senator. As I have tried to make clear in my comments, I think in substantive antitrust law, in antitrust enforcement practice, and in the remedy side, it is always necessary for us to strike a balance between the interests of the public and the interests of individuals, the interests of the activity of the economy.

It is clear that treble damages, as an incentive to bring private enforcement and for deterent effect, are valuable in certain kinds of cases. As I have indicated, we feel the cases are those that generally result in a particular kind of underpayment or overcharge to those who are victimized. On the other hand, the Government clearly does not need the incentive, and we feel that in most cases of this kind brought by the Government, the additional disincentive of treble damages is probably not important from a deterrent point of view. So I think I would not agree with that on balance.

Senator **Metzenbaum**. From your written testimony, it appears that you might misunderstand the amendments I have proposed to the Tunney Act. S. 1407 would not require the court to approve dismissals of antitrust suits. It would, however, require that the court make a determination on the record of whether or not the court believes that the dismissal is in the public interest. When substantial Government resources have been experienced by one administration pursuing an antitrust suit, I think that the public is entitled to some explanation of why that action is being dismissed.

Wouldn't you agree with that?

Mr. **Ong**. I really think, as I have pointed out in my written testimony—and I believe I did understand the thrust of the amendments that you proposed—that those amendments, if enacted intc law, would raise some serious constitutional questions. There can always be concern or a question about why a prosecutor chooses to dismiss a particular case. But as I have pointed out, to place the court in the position of second-guessing that dismissal raises a question under the separation of powers doctrine in the Constitution, and it also raises a question with regard to whether or not there is really a case or controversy which the court can properly and constitutionally address.

So I feel that those reasons really override any concern that others may have about the propriety of a dismissal. Dismissal, it seems to us, is a fundamental discretionary power of any prosecutor.

Senator **Metzenbaum**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

I want to compliment you, Mr. Ong, and the Roundtable for your involvement and your obvious understanding and contribution here. Senator Thurmond has asked that I ask a question on his behalf, which is this:

How do you respond to the argument treble damages are meant not only to encourage enforcement of antitrust laws by private parties, but also to act as a deterrent; and that those who violate the antitrust laws against the United States should be treated no differently than those who violate the antitrust laws against private parties?

Mr. **Ong**. Well, I think I have really answered that question to the chairman, but let me just say again that we feel, on balance, the deterrent effect is not necessary in cases brought by the Government. And, clearly, the Government does not require the treble damage incentive to bring the case. So we feel on balance that treble damages should not be available to the Government in cases of this kind.

Senator **Specter**. Thank you very much.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you.

Mr. Ong, I think that you wanted to leave and get somewhere.

Mr. **Ong**. I did, indeed. I have an engagement back in Akron, and I would appreciate it, Mr. Chairman, if you would excuse me.

Senator **Metzenbaum**. I certainly understand. Thank you very much for being with us.

Mr. **Ong**. Thank you.

Senator **Metzenbaum**. Mr. Satagaj, happy to have you with us this morning, sir.

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNCIL, WASHINGTON, DC

Mr. **Satagaj**. Thank you, Mr. Chairman. I appreciate the courtesy of putting me on early, and I will be brief.

I am John Satagaj, and I am here on behalf of the Small Business Legislative Council. The council is a permanent, independent coalition of over 90 trade and professional associations. We represent everything from agriculture to manufacturing and everything in between.

I want to thank the chairman for this opportunity. You have been a long and trusted friend of small business in antitrust matters, and we appreciate your efforts.

I want to speak to three matters very briefly. On the subject of your bill, S. 1407, we believe Congress should restore to private plaintiffs the opportunity to seek injunctive relief to anti-competitive mergers. SBLC believes that it was Congress' intent to permit private business to challenge these mergers. The recent Supreme Court decision in *Monfort* has seriously impeded that right by creating artificial and unrealistic limitations upon private plaintiffs' standing to bring suit. If allowed to stand, these restrictions would gravely damage the entire system of private deterrence essential to our antitrust enforcement policy. Therefore, we recommend adoption of that section of S. 1407.

On the subject of S. 635, we would only say that we do not support the provisions on treble damages. We believe that they should remain as they are for the private sector and should remain in place.

And one other subject that you brought up earlier regarding McCarran-Ferguson I just want to to mention that we appreciate your efforts to pass a McCarran-Ferguson bill. We think it has been very helpful, and we appreciate what you have done.

Mr. Chairman, that is all I have to say today on behalf of the Small Business Legislative Council, and I will take any questions that you have.

[The prepared statement of Mr. Satagaj follows:]

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STATEMENT OF

SMALL BUSINESS LEGISLATIVE COUNCIL

BY: JOHN S. SATAGAJ

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES, AND BUSINESS
RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY

ON

S.1407, THE ANTITRUST REMEDIES IMPROVEMENT ACT OF 1987

MARCH 31, 1988

Mr. Chairman, and members of the Committee, I am John S. Satagaj, President of the Small Business Legislative Council (SBLC). The Small Business Legislative Council is a permanent, independent coalition of over ninety trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of over four million small businesses in manufacturing, retailing, distribution, professional and technical services, construction, transportation and agriculture. A list of our members is attached. I appreciate the opportunity to address this Committee.

Because of our interest not only in free and open, but also fair competition, we have a vital stake in the future directions of antitrust enforcement. In 1986, 1800 representatives of small business throughout the country attended the White House Conference on Small Business to determine those legislative objectives that are most desired by business concerns. Antitrust enforcement was a priority included in the final recommendations of the Conference. Likewise, at our 1987 SBLC annual meeting strong antitrust enforcement was ranked as SBLC's Priority Number 8 (see attachment).

Of great concern to SBLC are efforts to amend the antitrust laws. Legislative initiatives for revision of the federal antitrust laws must be carefully evaluated and considered in terms of their appropriate placement within the total philosophy of our nation's antitrust statutes. SBLC believes that Congress is now at a critical fork in the road. Proposals are being advanced which could seriously cripple the entire foundation of our historic system of free and fair competition. Other statutory changes, such as the one under discussion today, could only strengthen that foundation. Which path you choose to travel could well determine the future of small business in the United States. Without active, interested Congressional involvement, small business will not confront the law of the marketplace, but rather the law of the jungle.

SBLC believes this committee should restore to private plaintiffs the opportunity to seek injunctive relief to anticompetitive mergers of their competitors. SBLC believes that it was Congress' intent to permit private business to challenge anticompetitive mergers which may substantially lessen competition. But the recent Supreme Court decision in Monfort has seriously impeded that right be creating artificial and unrealistic limitations upon private plaintiffs' standing to bring suit. If allowed to stand, these restrictions would gravely damage the entire system of private deterrence essential to our antitrust enforcement policy. SBLC recommends to this committee that Section 16 of the Clayton Act be amended so that "any person, firm, corporation, or association engaged in any line of commerce or in any activity affecting commerce shall have standing to sue any other person, firm, corporation or association engaged in the same line of commerce or in the same activity affecting commerce to enjoin any acquisition prohibited by Section 7 of this Act."

In the Monfort case, the Supreme Court unceremoniously lowered the private attorney general into his grave. The district court and the circuit court both found the merger unlawful. But, because Monfort did not show that it would suffer a particular form of injury, the Supreme Court denied it standing to challenge the merger of two of its largest competitors. Therefore, the Court stated, "[W]e need not reach the questions of whether the proposed merger violates Section 7." But, of course, one of the purposes of Section 16 of the Clayton Act is to permit private plaintiffs to test the legality of mergers. It was not intended as a device for predicting the precise form of injury that the private plaintiff will suffer. As Justice Stevens pointed out in his dissent, the appropriate questions is whether "there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." That question can only be answered after the case has been tried on the merits. By concentrating initially on the nature of the plaintiff's potential injury, the Court creates a mechanism for avoiding the issue of a merger's legality and virtually eliminates private plaintiffs as effective adjuncts to government merger enforcement. Given the sad state of that enforcement, Section 7 will largely go unenforced. If the Monfort decision is not reversed by Congress, the competitive structure of the business community could be substantially weakened through unlawful acquisitions without any antitrust challenge.

Mr. Chairman, we believe the private right is essential to enforcement of the law. We wish to commend you for your efforts and thank you for the opportunity to appear here today.

/0466
Attachment

ATTACHMENT

1987 SBLC Issues Conference

Priority Number 8

ANTITRUST, MERGER AND PREDATORY ACTIVITY

The SBLC reaffirms its belief that the foundation of American antitrust policy must be a commitment to decentralized and deconcentrated economic and political power. Consistent with such a commitment is the creation of economic conditions in which both consumers and private enterprise enjoy optimal choice and opportunity created through active and fair competition. Therefore, ongoing enforcement of the broad mandates of existing antitrust laws should produce a diversified economy characterized by an abundance of small businesses, producing employment, innovation, and economic freedom. Congress must undertake long-range enforcement planning and monitoring which will deter economic concentration and anticompetitive marketplace activities. Specific SBLC recommendations include:

(1) preservation of antitrust enforcement efforts through provision of appropriate authority and resources to agencies such as the Federal Trade Commission and the Department of Justice;

(2) careful personnel review to insure that relevant policymaking officials demonstrate a genuine commitment to a meaningfully competitive marketplace featuring a healthy and expanding small business component;

(3) diligent oversight of existing specific enforcement policies through utilization of recently passed legal reporting requirements as well as legislative hearings where appropriate; and

(4) resistance to any statutory revisions which would weaken current laws, such the proposed "The Antitrust Remedies Improvement Act" which would seriously reduce the available damage remedies now serving as a strong deterrent to potential predators.

Merger Policy

The Department of Justice and the FTC have escalated a trend of permission for giant corporate mergers while simultaneously engaging in strong enforcement measure against relatively small mergers and acquisitions. Worse still, has been the introduction of statutory revisions, such as the Administration-supported "Merger Modernization Act." which would significantly weaken present Clayton Act restrictions upon proposed mergers. SBLC urges that the FTC carefully scrutinize mergers and acquisitions, particularly those involving larger corporations, and grant approval only when clear and convincing evidence supports the economic and social viability of such action. SBLC also urges that Congress decisively reject any legislative attempts to substitute standards of market power and economic efficiency for the broader, more desirable, condemnations of monopolies and anticompetitive practices contained in present statutes.

The Robinson-Patman Act

The Robinson-Patman Act forbids price discrimination between purchasers of goods of like quality in interstate commerce. A jurisdictional requirement of the Act allows action under the Act only where the price discrimination may lessen competition or tend to create a monopoly. Large buyers may claim a purchasing advantage, but this must be based on the cost-justified volume of their purchases. SBLC recommends that the "administrative repeal" of the Robinson-Patman Act must be reversed, funds specifically for Robinson-Patman Act enforcement need to be appropriated, and the Federal Trade Commission must be required to show the effects of its enforcement. Enforcement of laws to prevent predatory pricing must be reinforced, if necessary, by Congressional action, and vigorously enforced by the FTC.

Foreign Competition

It is possible that major trade reform legislation in areas such as "dumping" and economic subsidies can be created to assist the small business community. However, the rising emphasis upon "competitiveness" should be permitted to justify fundamental revisions of domestic antitrust statutes. SBLC believes that conclusive proof of beneficial foreign trade results in an essential prerequisite of any legislative alteration performed for this reason. Permission for more anticompetitive mergers at home will not fundamentally alter any relevant competitive conditions abroad. It will only seriously reduce the vitality of domestic competition, small business profitability, and consumer choice.

Senator **Metzenbaum**. Thank you very much, Mr. Satagaj. I do have some questions, but let me get clear in my own mind. There are various small business groups in this area. Can you tell me what your group is? Then there is a national independent—I do not know what they all are.

Mr. **Satagaj**. OK. I will try to run down the list. We consider there are, I guess, four big players in the small business area. My organization is a coalition of trade associations, so we do not represent any small businesses directly. We represent their trade associations. It is a wholly independent organization. It is managed by a board of the association executives of those trade associations. The National Moving and Storage Association, the National Association of Realtors, the American Association of Nurserymen—three different examples of associations that belong to SBLC. Totally independent, manage your own affairs is the concept of SBLC.

There is the National Federation of Independent Business. That is an organization of 500,000 small business owners throughout the country, and NFIB represents them directly through a staff here in Washington, also in California.

There is a third group called National Small Business United. That is an amalgamation of some regional trade associations. For example, COSE in Ohio, a Cleveland organization, is a member of National Small Business United, as is some small business members directly.

Then there is the U.S. Chamber of Commerce, of course. They maintain also a Council on Small Business, but we are not affiliated with them in any shape or form.

So that is the small business groups as they are today.

Senator **Metzenbaum**. Will you be good enough to provide for the record a list of the trade associations that are participants in your organization?

Mr. **Satagaj**. We would be happy to.

Senator **Metzenbaum**. Thank you.

[The information of Mr. Satagaj follows:]

Small
Business
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Members of the Small Business Legislative Council

- Alliance of Independent Store Owners and Professionals
- American Association of Nurserymen
- American Consulting Engineers Council
- American Council of Independent Laboratories
- American Dental Trade Association
- American Electronics Association
- American Floorcovering Association
- American Machine Tool Distributors Association
- American Society of Travel Agents, Inc.
- American Sod Producers Association
- American Subcontractors Association
- American Textile Machinery Association
- American Trucking Associations, Inc.
- American Warehousemen's Association
- Architectural Precast Association
- Associated Builders & Contractors
- Associated Landscape Contractors of America
- Association of Physical Fitness Centers
- Association of Small Business Development Centers
- Association of the Wall and Ceiling Industries-International
- Automotive Service Association
- Automotive Warehouse Distributors Association
- Building Service Contractors Association International
- Business Advertising Council
- Christian Booksellers Association
- Electronic Representatives Association
- Florists' Transworld Delivery Association
- Helicopter Association International
- Hobby Industries of America
- Independent Bakers Association
- Independent Bankers Association of America
- Independent Insurance Agents of America, Inc.
- Independent Medical Distributors Association
- Independent Sewing Machine Dealers Association
- International Association of Refrigerated Warehouses
- International Bottled Water Association
- International Communications Industries Association
- International Fence Industry Association
- International Franchise Association
- International Reciprocal Trade Association
- Latin American Manufacturers Association
- Machinery Dealers National Association
- Manufacturers Agents National Association
- Mechanical Contractors Association of America, Inc.
- Menswear Retailers of America
- National Association for the Self-Employed
- National Association of Aircraft and Communication Suppliers
- National Association of Brick Distributors
- National Association of Catalog Showroom Merchandisers
- National Association of Chemical Distributors
- National Association of Development Companies
- National Association of Home Builders
- National Association of Investment Companies
- National Association of Manufacturing Opticians
- National Association of Personnel Consultants
- National Association of Plumbing-Heating-Cooling Contractors
- National Association of Realtors
- National Association of Retail Druggists
- National Association of Small Business Investment Companies
- National Association of the Remodeling Industry
- National Association of Truck Stop Operators
- National Association of Women Business Owners
- National Candy Wholesalers Association
- National Chimney Sweep Guild
- National Coffee Service Association
- National Council for Industrial Innovation
- National Electrical Contractors Association
- National Fastener Distributors Association
- National Grocers Association
- National Independent Dairy-Foods Association
- National Machine Tool Builers' Association
- National Motorcycle Retailers Association
- National Moving and Storage Association
- National Office Products Association
- National Parking Association
- National Precast Concrete Association
- National Shoe Retailers Association
- National Society of Public Accountants
- National Tire Dealers & Retreaders Association
- National Tooling and Machining Association
- National Tour Association
- National Venture Capital Association
- Opticians Association of America
- Petroleum Marketers Association of America
- Printing Industries of America, Inc.
- Retail Bakers of America
- Small Business Council of America, Inc.
- Smaller Manufacturers Council
- Society of American Florists
- Specialty Advertising Association International
- United Bus Owners of America

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Senator METZENBAUM. From the perspective of small business, how would you assess this administration's record in enforcing the antitrust laws? You have heard Mr. Rule say how great they had been in bringing about criminal prosecutions. He did not address himself to their efforts in connection with private actions—fighting takeovers, mergers, et cetera. I will get back to that with him when he returns to the table, but I would like to get your view on it.

Mr. SATAGAJ. Well, Mr. Chairman, unfortunately, this is probably one of the few areas where we do disagree with this administration. We do not feel there has been vigorous enforcement of the antitrust laws. The chairman of my Antitrust Committee, Thomas Wenning from the National Grocers' Association, recently appeared before Chairman Rodino in the House Judiciary Committee and spoke to this issue at great length. I would be glad to provide his testimony for you for the record.

The bottom line is we think they could have done more, and that is part of the reason we believe S. 1407 is important, and particularly section 7, because if we do not believe the Government is doing it, perhaps we can help by having the private sector there as well.

Senator METZENBAUM. Well, the administration's detrebling proposal effectively eliminates treble damages for most monopolization in terminated distributor cases. Would it be fair to say these are the type of cases where small business tends to be the victim?

Mr. SATAGAJ. I think it would, Mr. Chairman, and that is why I mentioned in my comments that we do not support that provision of S. 635.

Senator METZENBAUM. And if treble damages were not available in a monopolization and terminated distributor cases, would small businessmen be less likely to sue to enforce the antitrust laws?

Mr. SATAGAJ. I believe that is true, Mr. Chairman.

Senator METZENBAUM. Do you think that there would be less deterrence?

Mr. SATAGAJ. Definitely. I think that is probably one of our prime goals, deterrence. Treble damages is very important for that reason.

Senator METZENBAUM. Do you think that S. 430 would benefit small business?

Mr. SATAGAJ. Yes, it would. We have also supported you and your efforts there as well. We are quite pleased that you are moving forward with that legislation.

Senator METZENBAUM. How do you feel it would help small business, if I may ask?

Mr. SATAGAJ. For very much the same reasons we have talked about in terms of deterrence and participation. It is ironic in this case—and I have said it to some of the people supporting this—that it is very unusual to find small business and some very large discounters on the same side of an issue. But this is one case where I believe that we are all together in understanding the need for the type of competition that S. 430 would protect.

Senator METZENBAUM. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Let me compliment you and your organization for your interest and your contribution here.

Mr. **Satagaj**. Thank you, Senator.

Senator **Specter**. Senator Thurmond has asked, as ranking member on this committee, that I ask this question of you. As Mr. Rill and others who oppose overturning the *Monfort* decision have stated, one of the difficulties with giving all competitors the right to challenge mergers is that some competitors, for their own purposes, will challenge the wrong acquisitions; that is, they will challenge those acquisitions which increase competition and cause business problems for them, rather than those that are anticompetitive. How do you respond to this argument?

Mr. **Satagaj**. I recognize that the opponents of the legislation do feel that that is a problem. I would say the experience in the small business community is that overall it has been beneficial. Everybody is entitled to a judgment, and it is a factor to consider. In our judgment, there are more benefits to having that right than not.

Senator **Specter**. So you think if they pursue their own self-interest it will help the general interest generally as well?

Mr. **Satagaj**. Yes. Exactly.

Senator **Specter**. Thank you.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you.

Thank you very much, Mr. Satagaj.

Mr. **Satagaj**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Now, Mr. Rule and Mr. Oliver, would you be good enough to return?

[Pause.]

Senator **Metzenbaum**. Mr. Oliver, thank you for being patient with us. It helped Mr. Ong and Mr. Satagaj.

Recently, the Federal Trade Commission refused to conduct a complete investigation of the proposed merger of Federated Department Stores and the Campean Corp. The FTC decided not to get all the facts, even though a merger of these two companies would create the largest retail department store firm in the country. They both own a large number of department stores in Boston, the New York City area, certain metropolitan areas of Florida and in other areas.

Now, despite the indications of competitive problems, you failed to issue a second request for information in that case. My question to you is: Have you appointed a basic policy of not issuing second requests in department store mergers?

Mr. **Oliver**. Senator, you say "despite the indications of competitive problems." That may be your view and obviously you are entitled to your view, but the staff of the Federal Trade Commission spent a considerable amount of time looking at this merger, something like 250 hours. It was not the first department store merger they had investigated, so they were aware of the industry and the nature of the industry. They spent a considerable amount of time, as I say, investigating it and came to a conclusion that there was no competitive problem. That was the reason the FTC did not proceed with further investigation and did not issue a second request.

So I think it is not fair to say "despite the indications of competitive problems."

Senator **Metzenbaum**. Have you adopted a basic policy of not issuing second requests in department store mergers?

Mr. **Oliver**. We have no basic policy not to issue second requests or to issue them. We issue them when we think we need more material.

Senator **Metzenbaum**. Did you issue one in the case of the proposed Macy's-Federated merger?

Mr. **Oliver**. I do not remember all the times we have issued second requests. We issue them when the staff believes it does not have sufficient information from the original filing, but not otherwise. Because second requests are very burdensome, and if the staff feels that it does have adequate information——

Senator **Metzenbaum**. I think it is right before you now.

Mr. **Oliver**. I beg your pardon?

Senator **Metzenbaum**. I think it is right before you now.

Mr. **Oliver**. We did not issue a second request in that matter. You are absolutely correct. We did not issue a second request, but that is not a decision based on a general policy. That is a decision made by the staff that the staff does not believe that it needs further information. So we have no policy with respect to second requests in any kind of merger.

Senator **Metzenbaum**. When, if ever, have you issued a second request in the case of a department store merger?

Mr. **Oliver**. I do not know the answer to that offhand, Senator.

Senator **Metzenbaum**. In the Associated Dry Goods-May Company merger, you took no action. The Attorney General of Pennsylvania took action, and as a consequence, there was a divestiture of some of the stores—I think in the Pittsburgh area, if my recollection serves me right. And as a consequence, competition was maintained. Had it not been for his action, competition would not have.

You failed to act in that case. You failed to act in the possible Federated-Campean merger. You failed to investigate a possible Macy's-Federated merger. Some would come to the conclusion that there is something about the department store area, when you have got two big stores operating in the same area and they are now competing, and they are going to be owned by one big store, by one big company—you do not have to be a genius to know that you are going to eliminate some competition. You do not have to be a double kind of genius in order to recognize that the consumer is going to get hurt. If you eliminate two department stores in the same area competing with each other, there is going to be a hurt to the consumer.

I just have to question how you justify that. It is not enough just to say: Our people did not find the answer. The Attorney General of Pennsylvania can find the answer. How can you be so bland and say that we do not find any impact upon competition?

Mr. **Oliver**. I would say that the attorney general of Pennsylvania found the question, but he did not necessarily find the answer. You say that competition was maintained as a result of his action. I think that is questionable.

The company settled with him, and as you know, consent agreements or settlements do not necessarily indicate that the company thinks there is a competitive problem. Their interest is different.

Senator **Metzenbaum**. Didn't they agree to sell off some of those stores?

Mr. OLIVER. Sure, but their interest is in proceeding with their entire merger. And if one attorney general comes along and puts a monkey wrench in the process, and they can solve the problem in a limited way, it is in their interest to proceed with their entire operation even if they have to settle with one particular attorney general. I do not think you can reach a conclusion that competition would not have been maintained but for that agreement. That is certainly not the conclusion that the Federal Trade Commission came to.

Senator METZENBAUM. I am out of my time.

We did not ask that your written testimony comment on the provision of S. 1407 to enable the Justice Department and the FTC to sue as parens patriae on behalf of consumers. Commissioner Strenio, however, has indicated to the subcommittee that he supports this provision and believes it would deter anticompetitive behavior. Do you agree?

Mr. OLIVER. With the parens patriae part?

Senator METZENBAUM. Yes.

Mr. OLIVER. Well, it seems to me that we have not identified a problem that allowing the United States to have parens patriae authority would solve. I guess I would say simply that the system seems to be working as it is now. And until we identify specific, discrete problems, areas where that would be useful, I think I would not be in favor of changing the system.

Senator METZENBAUM. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Rule, pursuing the question that I was on when my time expired before, perhaps to boil down the matter since we have other subjects to cover, isn't it true that when Judge Real issued the TRO, temporary restraining order, that he flatly disagreed with the conclusions of the Justice Department reaching the consent decree with Beazer?

Mr. RULE. I do not think that is a fair characterization, Senator. A TRO is simply an emergency procedure for the court to hold things in abeyance while it can consider who is right and who is wrong. And I do not read any more into it. We will see. It is in litigation now. We are briefing the matter today. I think the judge is holding a hearing on Monday, and we will see how that all comes out. But it probably would not be appropriate for me to comment very much further on the proceedings before Judge Real.

Senator SPECTER. Well, I think you have already answered the question. You do not think he dealt with the merits. I would disagree with you as a legal matter. It seems to me that on the papers presented to him that he did feel that the consent decree was not appropriate. But let me move on to the next question.

You had said that—do you want to respond?

Mr. RULE. Well, that is normally not the way one interprets a TRO that maintains the status quo for 10 days. Usually, that is done so the parties have time to make their arguments in favor of a PI or whatever, as Koppers wants here. Anybody can characterize anything the way they would like to, but normally, when we get TRO's in our cases, we do not view that in and of itself as an out-and-out ultimate victory. We view it as giving us the opportunity ultimately to get a victory, or ultimately to get a defeat. But it is only designed to hold things in abeyance so the court can consider the merits of whoever is the moving party for an injunction.

Senator SPECTER. Well, but isn't that more than just holding things in abeyance? Doesn't the grant of the TRO on the papers presented carry with it, at least prima facie, that the judge does not consider the action which has been taken justified?

Mr. RULE. I think it does indicate that the judge thinks there are issues that he wants to consider, but I do not think it indicates—again, not necessarily talking about this specific case—but generally I think it would be incorrect to take from a TRO that the judge has decided the matter.

Senator SPECTER. Well, he has not decided the matter because there has to be a preliminary injunction and a hearing on the final injunction. Even a preliminary injunction does not consider it. But it is just not freeze the situation without any analysis or determination on the merits. At least prima facie, the judge, in issuing a TRO, has made a determination that he does not want the matter to go forward, that he thinks that there is merit in the complaint which Koppers had brought.

Mr. RULE. Well, I think that he thinks that there are issues raised. Again, it may just be a question of degree, and I understand how you are interpreting it. I hope you understand how we are interpreting it. We certainly do not view it as a defeat.

Senator SPECTER. Well, I understand. I just disagree.

On the issue of what information Koppers had provided to you, you say that they had not provided substantive information. That is directly at variance with the representations which were made to me in some detail by their counsel, John Bodner.

What I would like you to do——

Mr. RULE. Senator, may I? Because after we had had that colloquy, I inquired further and you are right. I think I misspoke.

Bodner, Koppers' counsel, did provide us with some information. I understand that there was further information that he indicated he was going to provide us the week following the week when we had the consent judgment filed.

What he did not provide us with, as I understand it, was detailed information on why a divestiture would not work. But he did provide us with information. In fact, the staff sat down with him and identified as a problem that was solved one of the issues that Mr. Bodner had raised, the aggregates market.

Senator SPECTER. Well, Mr. Bodner said to me—this is included which I sent to Mr. Meese with a copy to you—that he had provided substantial information regarding three facets: cement, readymix concrete, and aggregate materials. And extensive documents were provided on Wednesday the 16th of March, Thursday the 17th, Friday, March 18, and that he was in the process of providing more documents. And on the 18th, there was extensive legal material filed—the complaint, the proposed decree and a competitive impact statement—which had been worked out between Justice and Beazer, which raises the clear inference, really the conclusion that at the time he was providing this information and was in the process of providing more information, Justice had already struck a deal with Beazer.

And that raises the question of bad faith. How about it?

Mr. **Rule**. Senator, I can appreciate that people disagree with our conclusions. But it seems to me that bad faith is a pretty strong allegation.

As I said, we were familiar with this market. We, in fact, solved the competitive problem and demanded a fix in aggregates. We knew these other markets from a number of investigations, including this one.

The Department of Justice, leaving aside this case, cannot be put in a situation where parties that have other axes to grind try to put us in the middle to accomplish something other than antitrust ends.

Senator **Specter**. Mr. Rule, there is no allegation of bad faith. There is a question of bad faith. If you knew it when Mr. Bodner provided all this material to you and is in the process of providing more, then it would seem to me you would say: Mr. Bodner, we know the field. We have investigated it. We know it conclusively—the reasons you have just said, if they're supportable—and we do not need any more information.

But why string him along? Why get more information and have him provide more to you at a time when you have got the papers filed and you have made up your mind? You had made up your mind by the 18th. You filed the consent decree.

Mr. **Rule**. Sure.

Senator **Specter**. So why sit and take his information if you have made up your mind?

Mr. **Rule**. Well, first of all, we do not tell the parties, much less third parties, that we have made up our mind until we tell the public.

Senator **Specter**. Who is the third party? Is Koppers the third party?

Mr. **Rule**. Yes. Mr. Bodner was in this case.

Senator **Specter**. Koppers is the third party?

Mr. **Rule**. Yes, we do not tell parties—we do not make, generally, our decision——

Senator **Specter**. You told Beazer?

Mr. **Rule**. When we told Beazer what we were going to do, what my decision was—and I am the one who makes the final decision—as I understand it, as we always do because of concerns about the Securities Act, although I will check into this, we would have made that information available to the public.

Senator **Specter**. Now, wait a minute, Mr. Rule. You do not make a decision. You have a consent decree. You make an agreement with Beazer. Beazer knows when you are making an agreement with them. Why isn't Koppers entitled to notification at least when Beazer is notified?

Mr. **Rule**. I will check on this and find out. In fact, if you can hold on one second, let me just get a clarification.

[Pause.]

Senator **Specter**. Mr. Rule, will you tell us for the record the source of the information?

Mr. **Rule**. Yes. The source is Judy Whalley, who is my deputy and who also reviewed this matter for me and with me.

As is always the case, obviously in negotiation of the consent decree and as things work their way up, people involved know what the staff's view is. But there is no decision, there is no sign-off on the terms of the consent decree. There is no sign-off on the terms of the negotiation. In fact, there is no sign-off on whether or not to bring a complaint until I make that decision.

And when I made that decision and that view was communicated to Beazer, when the decision to file had been made—and that was made close upon the filing on March 18, and I was considering the matter very carefully at that time—it was also communicated to the public. We do that as a matter of course so as to avoid any allegations that somehow we may have provided inside information to somebody. But that is a matter of course that we do that.

Our attorneys are generally pretty good in the sense that, A, they always take information and are very friendly and courteous to people who want to provide information; and, B, in trying not to tell the world indirectly what they are thinking or what I am thinking. When we made that known to Beazer, we made it known to the public as well.

Senator **Specter**. Well, Mr. Rule, what you are saying is that it is not final until you sign off on it. But there is a great deal which occurs prior to that time. There is an agreement entered into between the parties; specifically, the Department of Justice and Beazer at the staff level. The agreement is not final until it has your approval. But there are extensive negotiations and there is a meeting of the minds of staff, subject only to your final approval.

Now, I understand what you are saying that it is not final until you sign off on it. And if you sign off on it on the 18th, it is not final until that time. But what you really have is that Beazer knows exactly what is going on, unless you disapprove it. And Beazer understands, and the practicalities are that if your staff makes the recommendation, it is highly likely that you will accept it.

Now, sometimes you do not, but Beazer has an expectation you will. But all the time this is going on, Koppers does not know that it is happening. And Koppers is negotiating at the same time. So at least insofar as your staff is concerned, the same people are negotiating with Beazer who are negotiating with Koppers. And Koppers is providing a lot of information. Koppers thinks they are in the game, and Koppers thinks that Justice is considering the Koppers position. But all this time staff has made up its mind, subject to your approval, that they are going to strike a deal and they are going to have a consent decree.

It seems to me that that is a policy you really ought to rethink. And when you say that Koppers is not a party, I do not think that is legally correct. I know they are not a party on the suit, *United State of America* v. *Beazer*, but they are a party here in terms of the complainant and the competitor which is involved in the antitrust aspect. They would be a private party if it were a private suit. Certainly, the overriding considerations here are takeovers. It seems to me they are very much a party and ought to be accorded party status.

Mr. **Rule**. But, Senator, I hope you would agree with me that the responsibility and the focus of the Antitrust Division has to be on the antitrust laws. We listened to the arguments that Koppers made, and, in fact, as you know, we filed a consent decree that we have stated we believe fixes the problem in the aggregates market. And as I said, we had very good knowledge of the three industries in the California area that were under investigation that Koppers had made allegations about.

So I think we did everything we should have done, but we were not negotiating to cut a deal or whatever. What we were doing was trying to solve a competitive problem. I think we did. The fact is that it was not necessary in terms of negotiating that deal to talk to Koppers—and we listened to all the information that Koppers had.

As I say, I am having a meeting with Mr. Bodner today to hear what his concerns are, and we will listen. We always listen, and we never tell people not to talk to us. And I do not think it would be right for us—just like it is not right for us to delay a matter, it is not right for us to close our door and say: "Look, I am not going to talk to you." We will always listen to people when they come in, and we will always read whatever they send in, even if it is cumulative and not helpful. But we do not tell them not to send it in.

Senator **Specter**. Well, when my time comes back, I will ask you: Isn't it a little late to talk to Koppers and Mr. Bodner now?

Senator **Metzenbaum**. I am going to let these witnesses go unless you—we have two other witnesses, and I would like to give them a chance. One is from the American Bar Association and one is from the Committee to Support the Antitrust Laws.

Senator **Specter**. Well, Senator Metzenbaum, I do have a couple more questions for Mr. Rule.

Senator **Metzenbaum**. Well, would you be good enough, then, to wait longer again Mr. Rule? I am sorry but I have got to be fair to the other witnesses as well. They have their own time commitments as well as ourselves. I am sorry.

You do not need Mr. Oliver?

Senator **Specter**. Well, I need Mr. Oliver on the NFL issue.

Senator **Metzenbaum**. I guess I will ask you if you will both wait again. I am terribly sorry, but I do not know any other way to be fair to all the witnesses.

Mr. **Oliver**. Do you have any idea how long we are talking about?

Senator **Metzenbaum**. We are talking about 5 minutes for Mr. Rill, 5 minutes for Mr. Cuneo. We do not have that much——

Senator **Specter**. I will forego my questions in the interest of time, Mr. Chairman, as to the other witnesses.

Senator **Metzenbaum**. Thank you very much.

Senator **Specter**. May I say that Senator Thurmond has asked that certain questions be asked of Mr. Rule and Mr. Oliver. Staff says it would be satisfactory to answer those for the record, so that will save time.

Senator **Metzenbaum**. But you want the witnesses to wait so you may ask questions?

Senator **Specter**. I do want to ask questions.

Senator **Metzenbaum**. No problem.

Thank you very much, gentlemen.

Mr. **Oliver**. I appreciate it, Senator. We will be happy to respond to all written questions.

Senator **Metzenbaum**. Pardon?

Mr. **Oliver**. I will be happy to respond to all written questions.

Senator **Metzenbaum**. But I think that Senator Specter has some additional oral questions.

Senator **Specter**. I do.

Mr. **Oliver**. Oh, he does?

Senator **Specter**. I have more questions on the NFL.

Senator **Metzenbaum**. So we will ask you both to wait.

[Pause.]

Senator **Metzenbaum**. Mr. Rill is chairman of the Section of Antitrust Law, of the American Bar Association. We are very happy to have you with us and very happy to hear your testimony. But I have always had some feeling that when you get into certain areas, perhaps personal injury work, antitrust laws, FELA matters, whatever, that you can pretty well conclude how a committee will come out if you see how that committee is made up.

Could you give me your view, before you start your testimony, as to what percentage or what number of the Antitrust Committee could be considered plaintiffs' counsel, what percentage could be considered defense counsel?

STATEMENT OF JAMES F. RILL, CHAIRMAN, SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION, WASHINGTON, DC

Mr. **Rill**. I really am unable to answer that question. The Antitrust Section of the American Bar Association has about 11,000 members. I have no way of knowing what the balance is between defense and plaintiffs' counsel.

Senator **Metzenbaum**. How do you arrive at a conclusion?

Mr. **Rill**. The section makes a recommendation to the American Bar Association, as it did in this case, by a resolution of its council. The council is 15 members plus the officers of the Antitrust Section. There are people on the council who are corporate lawyers; that is, who are in-house counsel for corporations. There are people on the council who do primarily defense work, as I do, although our firm is involved in a number of plaintiffs' cases in the electrical contractor area, representing antitrust plaintiffs. I know that there are some of the council who do primarily antitrust plaintiff work.

So I think that it is difficult categorically to answer your question. I think increasingly in the antitrust area it is not typical that a firm will be always on one side or always on the other side of an antitrust issue.

Senator **Metzenbaum**. I guess what I really am asking is, you have got a 15-member council plus the officers; that group, are they elected or are they appointed?

Mr. **Rill**. They are elected by the section. The council is elected by the section at the annual meeting of the American Bar Association. A nominating committee of the section is formed. The nominating committee is appointed by the chairman of the section. The nominating committee submits a report. The report has to be published I think 60 days in advance of the annual meeting. Nominations by petition are accepted, and, in fact, the notice of the action of the nominating committee invites nomination by petition. And then at the plenary meeting of the section, the slate is voted upon.

Senator **Metzenbaum**. Well, the reason I ask the question is, to the best of my recollection, I do not remember the Antitrust Section of the American Bar Association ever coming forward and being supportive of stronger antitrust enforcement or antitrust legislation, with the exception of the fact that I know you support me, as my staff just pointed out, on repeal of the McCarran-Ferguson Act. But other than that, I do not remember too many instances, and that is the reason I sort of asked for the composition.

Mr. **Rill**. May I give a couple of other instances?

Senator **Metzenbaum**. Sure.

Mr. **Rill**. We have a position, as you point out, on McCarran-Ferguson. The Antitrust Section's position—this is public information—is to be submitted to the House of Delegates of the ABA and calls for modification of McCarran-Ferguson by a date certain. And if certain fine-tuning and safe harbors were provided for, it would be done within that time period.

That position was to be presented to the House of Delegates of the ABA in February. There was a request that we attempt to negotiate with the interests of other sections. We are undertaking that negotiation process now, but our position has not been modified. And we intend to go with it to the House of Delegates at the annual meeting in August.

I regret Senator DeConcini is not here at the moment, but the American Bar Association also opposes the legislation that would create a special antitrust exemption for the beer industry and are with you, I believe, Mr. Chairman, on that legislation. And for that matter, in the legislation before the subcommittee today, we favor the extension of treble damage remedies to the Federal Government; we favor the consideration of the viability of an acquiring company in connection with the settlement of divestiture in a section 7 case; and we favor it because we thing it is consistent with the practice of the agencies, the proposal to require Tunney Act procedures to be extended to modifications of existing antitrust consent decrees.

So we are not here with a defense mind, if you will, if it can be so categorized, even on the bill before us today.

Senator **Metzenbaum**. Go ahead.

Mr. **Rill**. I do appreciate the opportunity to appear before the subcommittee today and testify on S. 1407 on behalf of the American Bar Association. This position was adopted by the House of Delegates of the American Bar Association in February.

I regret, and I would like to extend my particular apologies to Senator Thurmond, as well as to the other members of the committee, that the ABA does not have a position on the provisions of his legislation relating to detrebling and to claim reduction. It is my hope that we will be able to forge such a position and present it to the ABA House of Delegates by August. And if time and circumstances permit, then we will be able to present our views to the subcommittee and Congress at that time.

Mindful of the 5-minute warning buzzer, I would simply like to summarize my testimony.

Senator **Metzenbaum**. All the questions that I asked you were not taken from your time.

Mr. Rill. I noticed that by the light, and I appreciate that, Mr. Chairman.

Nevertheless, I will be brief. I would like to state that the American Bar Association Antitrust Section does favor strong enforcement of the antitrust laws. I think that while reasonable people can disagree as to what constitutes enhancement of efficient enforcement, that certainly is a driving force behind the activities of this section. And in this instance, I think we have been able to prevail the American Bar Association to adopt a similar position.

We do favor extension of treble damage relief to the Federl Government when it is a consumer in a price fix or similar situation, and is injured by an antitrust offense. We think that logic supports that position. We think that while perhaps the Federal Government does not need the incentive of treble damages to come forward and bring antitrust cases as a private damage claimant, the additional deterrent that could be presented by a Federal Government treble damage action is worthwhile in the overall context of treble damage analysis. We think it is appropriate that treble damage relief for the Federal Government is considered in the context of a hearing, which also considers overall treble damage review.

I will skip over the provisions of our testimony which deal with the supervision of divestiture. That is in S. 1407 and is related to the Tunney Act amendments. But I think in large measure my testimony is fairly straightforward on those issues. I would like to address for a moment the question of the intervention of a State attorney general as a matter of right in divestiture proceedings. We believe that the Tunney Act currently provides ample opportunity for a State attorney general to present his or her views in a settlement of a section 7 action and the approval of a consent decree, and believe that any further acknowledgment of those rights might unduly raise non-antitrust considerations in the deliberations.

With respect to the Tunney Act extensions, we favor extension of Tunney Act procedures to consent decree modifications. That is existing practice. I have been through it myself. It is not always a pleasant or expeditious proceeding, but it seems to make a lot of sense.

We are concerned with and oppose the provisions of S. 1407 which would extend Tunney Act procedures to terminations or dismissals of antitrust suits. Basically, we think that is improper on article III constitutional grounds. We think it raises a serious question as to separation of powers between the courts and the prosecuting agencies. And we are concerned that it might, in fact, act as a deterrent to the Federal Government in maintaining actions that it might otherwise bring.

Finally, on the issue of competitors' standing in section 7 cases, we are concerned that very often competitors, in attempting to maintain private actions to challenge horizontal acquisitions by their competitors, are very often motivated by considerations which suggest that the acquisition is procompetitive. State another way, we believe that competitors who assume the role of private attorney general are concerned with efficiencies that would give the merged companies an advantage over them, which would, nevertheless, be procompetitive, would be able to get preliminary injunctions—maybe not win on the merits, but get preliminary injunctions that could disrupt otherwise proefficiency, procompetitive acquisitions.

I see that my light has gone on. I appreciate the time of the subcommittee to present the views of the American Bar Association and look forward to any questions that the subcommittee may have. Thank you.

[The prepared statement of Mr. Rill follows:]

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STATEMENT OF

JAMES F. RILL

ON BEHALF OF THE AMERICAN BAR ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING VARIOUS PROVISIONS OF S. 1407

MARCH 31, 1988

COMMENTS OF THE AMERICAN BAR ASSOCIATION

I am James F. Rill, an attorney in private practice in Washington, D.C. I serve as the Chairman of the American Bar Association Section of Antitrust Law. I am honored to appear here today on behalf of Robert MacCrate, President of the American Bar Association, to express the Association's views on those provisions of a bill introduced by Senator Metzenbaum, S. 1407, which would amend several sections of the Clayton Act. As relevant to the hearings today, S. 1407 would make the following changes from existing law: (i) it would allow the United States to recover treble damages when it is injured by a violation of the antitrust laws; (ii) it would change the substantive and procedural requirements with respect to consent judgments involving divestitures; (iii) it would grant state attorneys general the right to intervene in Federal merger actions to protect the interests of employees in their states; (iv) it would extend the Tunney Act to modifications of existing consent decrees and to dismissals of federal civil antitrust actions; and (v) it would overturn the Supreme Court's decision in Cargill v. Monfort by granting businesses standing in every case to challenge mergers involving their competitors.

Historically and currently, federal enforcement is the driving force which gives substance and direction to antitrust policy. In several respects, S. 1407 would enhance the efforts of the Federal Government to enforce the antitrust laws. In other respects, however, the proposed legislation could vitiate that enforcement.

I. Treble Damages for the U.S. Government in Antitrust Actions

Section 3 of S. 1407 would amend 15 U.S.C. Section 15(a), which currently provides that the United States may recover actual damages for antitrust injuries to its business or property. The proposed amendment would permit recovery of treble damages. [1] Denial of treble damages to the United States is an anomaly. There appears to be no justification for denying it the same remedies awarded other litigants.

In addition to the simple fairness of even-handed treatment of injured parties, the same reasons which justify treble damages on behalf of private litigants should apply where the government is the plaintiff. Treble damages both act as an incentive for the government to sue and work as a deterrent against antitrust violations. See Semke v. Enid Automobile Dealers Association, 456 F.2d 1361, 1370 (10th Cir. 1972) ("The purpose of the trebling section is to encourage enforcement of the antitrust laws, and treble damages thus serve as an incentive."). While the incentive aspect may not be as necessary where the federal government is the injured party, [2] the deterrent (and punitive) aspects should be unaffected by the identity of the plaintiff. In short, the anomaly posed by the current provision is unsupportable in view of the purpose of treble damages. Companies which violate the antitrust laws should not be entitled to escape treble damages simply because their victim was the government, and not a private party.

II. Section 4: Increasing Judicial Oversight of Consent Judgments Requiring Divestiture

Section 4 of S. 1407 would narrow the discretion the Antitrust Division and the Federal Trade Commission now have in fashioning consent judgments requiring divestitures as a remedy for violations of Section 7 of the Clayton Act. To that end, it would impose both new procedural and new substantive requirements. Procedurally, S. 1407 would provide that any consent judgment that includes a divestiture requirement may not become final until the divestiture has been approved by either the court or the Commission. Substantively, the bill would provide that before either the Commission or the court may approve a divestiture, it must find that : (i) the divestiture fully restores competition; (ii) there is a substantial likelihood that the buyer will be a viable competitor for the foreseeable future; and (iii) reasonable steps have been taken to protect the interests of affected employees and to preserve employment.

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[1] The Administration's bill (the "Antitrust Amendment Act of 1987"), which seeks to eliminate treble damages for all parties except in price-fixing cases, would permit the United States to recover treble damages in price-fixing actions brought on its own behalf.

[2] The legislative history of the current provision emphasizes that the United States should have incentive to sue because it is "charged by law with the enforcement of the antitrust laws . . . " 1955 U.S. Code Congressional and Administration News p. 2330.

While there are strong public policy considerations for insuring that antitrust divestiture decrees are fully effective in remedying the anticompetitive effects of unlawful mergers, the approach taken by S. 1407 would unnecessarily restrict the enforcement agencies efforts to secure this objective. It is certainly true that, in the past, divestiture decrees were all too often ineffective. This problem seems to have been largely corrected by a combination of legislative and administrative steps over the past decade. Through the Hart-Scott-Rodino Act, both agencies now have an opportunity to review proposed mergers before they are consummated and to obtain the information they need to fashion an effective divestiture decree. Based on the experience they have gained over the years, both agencies now routinely require that divestitures be completed promptly (usually within 6-12 months) and that the buyer be approved in advance by the agency. Finally, and perhaps most notably, when a consent judgment is finalized before the prospective buyer is identified, the agencies now generally insist on provisions that call for a court-appointed trustee to sell the assets in question at the best available price should the defendant fail to divest them within the prescribed period. This provision appears to have been largely successful in ensuring reasonably prompt divestiture to approved purchasers.

In addition, the Federal Trade Commission is exploring use of the "jewel-in-the-crown" mechanism to ensure effective divestiture. This approach provides for divestiture of more attractive assets in the event the respondent fails to accomplish divestiture of other, designated assets within the time prescribed by a consent settlement. 3/

Since these new procedures have been in place, we are aware of few cases in which the divestiture required by a consent judgment has not been satisfactorily completed. There will always, of course, be a few unfortunate cases -- such as LTV/Republic -- where the divestiture fails to achieve the agency's objectives. We do not believe, however, that the new statutory requirements proposed by S. 1407 are warranted by these rare cases, nor that they would be any more effective than current practice in guaranteeing successful divestiture.

A. Section 4's Procedural Requirements

Under present law, a consent decree can become final as soon as the court or Commission satisfies itself that the scope of the proposed divestiture will adequately remedy the loss of competition that gave rise to the violation. While the language of S. 1407 is not entirely clear, the intent of the bill, according to Senator Metzenbaum, is to require, in addition, that an acceptable purchaser be identified before the decree becomes final.

In the case of Commission consent orders, it is hard to see what purpose this would serve since, under existing practice, the buyer must already in every instance be approved by the full Commission.

3/ See, Memorandum, How to Deal with Governmental Agencies, Barbara A. Clark, Deputy Director of Mergers and Administration, Federal Trade Commission.

S. 1407 would, on the other hand, substantially change the way in which Antitrust Division consent decrees are handled. It would, in effect, substitute a court for the Antitrust Division as the arbiter of the qualifications of any prospective buyer. While it may well be true that the Division has, on occasion, misjudged whether a particular buyer would be a viable competitor, in general its record in this regard has been quite good. There is no reason that we can think of why the courts would be any more successful than the Division in this respect.

S. 1407, in addition to substituting the court for the Antitrust Division as the judge of the qualifications of prospective purchasers, would also have the effect of delaying the already lengthy Tunney Act proceeding. The determination that a proposed consent decree is in the public interest is generally not made until several months after the parties have agreed to the proposed decree and the merger has gone forward on that basis. If, as a result of S. 1407, this determination is further delayed until a buyer is identified, commented on and approved, the effect would be to add further uncertainty and delay to judicial review of proposed decrees.

It may be possible to avoid this problem by bifurcating the Tunney Act proceeding so that there would be an initial hearing to determine whether the scope of the proposed divestiture is sufficient, followed some months later by a second hearing on the qualifications of the prospective purchaser. While such bifurcation would provide more timely judicial review of the scope of the proposed divestiture, it would impose substantial additional administrative costs. Moreover, the delay and uncertainty inherent in a second hearing would make it more difficult to find a buyer for the divested assets.

On a more fundamental level, requiring judicial approval of the proposed purchaser in every case would be another step in the direction of substituting the courts for the marketplace in judging the most productive use of the assets in question. There should, in general, be a presumption that the buyer willing to pay the highest price for the assets will put them to their best use. The procedures contemplated by S. 1407 could, by giving disappointed bidders an opportunity to try to persuade the courts that they would make better use of those assets, have the unfortunate effect of converting the Tunney Act public interest determination into a comparative hearing on the merits and demerits of the various bidders. As the Federal Communications Commission has learned over the years, it is extremely difficult to resolve such comparative issues on any principled basis. It is far preferable, and we believe more consistent with the policies underlying the antitrust laws, to leave such comparative judgments to the marketplace.

If Congress is concerned that the absence of public participation deprives the Justice Department of information that would be useful in judging the prospective buyer's qualifications, we believe there are less onerous means of achieving that objective. For example, the Justice Department could be required to disclose the identity of proposed purchasers, as the FTC now does, so that interested parties could have an opportunity to bring information to the Division's attention that would be relevant to the Division's review of the buyer's qualifications. We believe that such a procedure could advance the goal of a more open and informed process of buyer selection, without imposing the burden of uncertainty and delay that requiring court approval would add to the Tunney Act process.

B. Section 4's Substantive Requirements

Sound antitrust policy requires that any assets to be divested should be sold only to a buyer who will be a viable competitor for the foreseeable future. Both the Antitrust Division and the Commission have always made this a key criterion for approving prospective purchasers. While they may occasionally have misjudged a prospective buyer's long-term viability, we do not believe that this, by itself, requires that this criterion be written into the law. If the Committee wishes, however, to add such a requirement to the existing statute, it would be entirely appropriate so long as it is made clear that the new provision simply codifies existing practice. Such new provision should not be construed to impose any additional requirements, such as mandating special-dealing obligations between the divesting company and the acquiring competitor. Requirements of this nature have been imposed only in the most extraordinary circumstances.

Serious questions arise, however, about the other substantive standards proposed by S. 1407 for approving divestiture decrees. The requirement that any proposed divestiture must "fully restore competition" would, in our judgment, be contrary to the substantive standards of section 7. Section 7 only prohibits those acquisitions that may tend substantially to lessen competition. In applying this statutory standard, the antitrust agencies and the courts face a difficult task in distinguishing acquisitions that, while increasing the market shares of the merged firm, are likely to enhance competition by creating a more efficient operation from acquisitions that are likely substantially to lessen competition.

A requirement that any divestiture fully restore lost competition could appear to require, in every instance, complete divestiture of all acquired assets, or at least of those in any market where there is any competitive overlap. Such a requirement would deprive the agencies of the flexibility they now have to allow the merged entity to retain some of the assets in a particular market and thereby capture efficiencies that will enhance competition, while still preventing undue concentration. The test is, and should remain, whether the divestiture cures the violation.

The most serious reservations involve the requirement that any divestiture "protect the interests of affected employees" and "preserve employment." The most significant economies to be realized from any merger flow from combining operations, which may well result in the loss of some jobs, at least in the short run. The economic theory underlying the antitrust laws is, of course, that by making American industry more productive such adjustments in the long run create more jobs than they cost. Also, jobs lost in one region are often jobs gained in another. Therefore, the focus of antitrust is on competition as a whole, not on localized labor interests. It is difficult to identify a reasoned way for the antitrust agencies to consider labor matters in their decisionmaking. Congress should not impose such a burden on them.

III. Section 5: Intervention By State Attorneys General In Tunney Act Proceedings

Section 5 of the bill would amend the Tunney Act to authorize intervention as of right by the attorney general of any state where a proposed divestiture will involve a facility employing 100 or more full-time workers.

Section 5 is presumably intended to complement the provision in section 4, discussed above, which would require that "reasonable steps" be taken to protect employment. Once again, we strongly oppose this effort to import labor considerations into antitrust. As previously indicated, the purpose of the antitrust laws to protect the competitive process may or may not be consistent with the preservation of employment opportunities at any particular plant.

This is not to say that input on mergers from state officials is unnecessary. Where there are legitimate questions to be raised regarding a consent decree's likely effect on the competitive process, the Tunney Act already provides ample opportunities for state attorneys general, as well as any other interested parties, to participate in the process. In those circumstances, it is entirely appropriate for state officials to voice their concerns.

Because current practice provides opportunities for input on competitive effects, and because there do not appear to have been any instances in which state officials with legitimate concerns were closed out of the Tunney Act process, section 5 is unnecessary. [4/]

IV. Section 6: Tunney Act Extension

Section 6 of the bill would significantly broaden the scope of the Tunney Act. [5/] Originally enacted as part of the Antitrust Procedures and Penalties Act of 1974, the Tunney Act establishes standard procedures for the courts to employ in reviewing proposed consent judgments in antitrust actions brought by the government to insure that those judgments will not be contrary to the public interest. S. 1407 would extend the provisions of the Act to encompass (1) modifications of existing decrees and (2) dismissals of civil antitrust actions.

It is worth emphasizing, at the outset, that the Tunney Act itself did not represent a dramatic departure from existing law. Courts have always had the power to review proposed consent decrees to insure that they are consistent with the public

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[4/] We also note three technical points pertaining to section 5 as drafted. First the amendment relates to "any proceeding under Subsection (e)" of 15 U.S.C. § 5. This section relates only to antitrust actions by the Justice Department whereas the proposed amendment to 15 U.S.C. § 5(f) covers both FTC and Justice Department proceedings. The reference to the FTC should be deleted.

Second, in order to make this proposed amendment consistent with the remainder of the bill, the reference should be changed to read "any proceeding under subsection (g)."

Third, the phrase to "any merger proposed by the Department of Justice or the Federal Trade Commission" is not accurate, since these agencies do not propose mergers.

[5/] 15 U.S.C. § 16.

interest. [6] The Tunney Act simply re-emphasizes the court's duty to consider the public interest and establishes uniform procedures for the courts to employ in carrying out that duty.

In the same vein, by extending the Tunney Act to modifications of consent decrees, S. 1407 does not represent a dramatic departure from existing law. To be sure, the bill provides that the court shall modify a judgment only if it determines that the modification is "in the public interest." But that provision, like its Tunney Act counterpart, simply restates the established judicial rule; it gives the court no greater (or lesser) discretion than courts of equity have always had to review proposed modifications of consent judgments. [7]

In extending the Tunney Act to dismissals of civil antitrust suits, however, the bill represents a significant departure from existing law. Courts traditionally have regarded decisions to dismiss suits as being matters of prosecutorial discretion -- matters that are not subject to judicial review absent some evidence of prosecutorial impropriety. [8] S. 1407, in contrast, requires courts to determine whether dismissals of civil antitrust actions brought by the government are "in the public interest" and provides that such actions "may be terminated only upon order before which such action is pending." [9]

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[6] E.g., United States v. Blue Chip Stamp Co., 272 F. Supp. 432 (C.D. Cal. 1967), aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968); United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970).

[7] E.g., United States v. Swift & Co., 1975 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. 1975); United States v. Radio Corp. of Am., 46 F. Supp. 654 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943).

[8] E.g., Parker v. Kennedy, 212 F. Supp. 594 (S.D.N.Y. 1963).

Each of these proposed extensions of the Tunney Act is addressed in turn.

A. Modifications of Consent Judgments

The ABA does not oppose extension of the Tunney Act to modifications of consent decrees. The Department of Justice has already employed Tunney Act-type procedures in cases involving substantive decree modifications. Moreover, as I noted earlier, the courts have always had a duty to review proposed modifications to consent judgments to insure that the modifications are not contrary to the public interest. S. 1407 re-emphasizes that duty and establishes specific procedures for the courts to follow in making their determinations.

There is a practical concern, however, about the scope of S. 1407 as drafted. Historically, many proposals to modify consent decrees have not implicated the decrees' substantive provisions. In these situations, which often involve mere technical adjustments, a court has always had the flexibility to tailor its public interest inquiry accordingly. S. 1407, by mandating that Tunney Act procedures be followed with respect to every proposed modification, eliminates that flexibility.

Absent some impact on the substantive provisions of a decree, we see no reason for the government, private parties and the courts to incur the delay and expense that application of Tunney Act procedures necessarily involves. Consequently, we propose modifying S. 1407 by adding the following new subsection:

> With respect to proposals for modifications of judgments entered in civil proceedings brought by or on behalf of the

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[9] To be consistent with the Federal Rules of Civil Procedure, the bill's references to the "termination" of a lawsuit should be changed to refer to the "dismissal" of a lawsuit.

> United States under the antitrust laws, the district court may, upon motion of a party or upon its own motion, issue an order relieving the parties of any or all of their obligations under subsections (d), (e), (f) and (i) of this section, if the court determines, in its discretion, that such an order is in the public interest.

With this addition, the bill will achieve its objective of insuring that the courts undertake conscientious review of proposed modifications of consent judgments, while avoiding the imposition of unnecessary delays and costs on the government, private parties and the judiciary.

B. Dismissals of Civil Antitrust Suits

The ABA opposes those provisions of S. 1407 that would extend the Tunney Act to dismissals of civil antitrust actions. To begin with, extension of the Tunney Act to dismissals of suits raises serious constitutional questions. Article III of the Constitution limits the federal courts' jurisdiction to the resolution of cases and controversies. When the parties to a particular case ask a court to enter a consensual judgment, and thereby to impose judicially enforceable burdens on the parties, they are asking the court to exercise its Article III powers. When the government agrees to dismiss a suit, however, there is no longer an extant controversy between the government and the defendant. Consequently, a court's review of the dismissal of a suit necessarily constitutes a collateral proceeding to review what is unquestionably a prosecutorial decision. For this reason, S. 1407's requirement that courts review dismissals of civil antitrust actions raises a significant separation of powers question. Indeed, at least two federal courts have suggested that efforts to extend the Tunney Act to dismissals of antitrust suits would face serious constitutional obstacles for precisely this reason. [10/]

[10/] In re IBM Corp., 687 F.2d 602 (2d Cir. 1982); United States v. Mercedes-Benz of N. Am., Inc., 591 F. Supp. 399, 401 (N.D. Cal. 1982).

Putting the constitutional question aside for the moment, the ABA believes that it would be unwise -- as a matter of policy -- to subject prosecutorial decisions to dismiss suits to review by the courts. In our political system, the Executive Branch is ultimately responsible to the public for the exercise of its prosecutorial discretion. Enforcement officials should not be encouraged to attempt to avoid political accountability by seeking to "share the blame" with the judiciary for a decision to dismiss a particular lawsuit.

In addition, we believe that by requiring a court to decide -- in effect -- whether it would continue to pursue a particular suit if it were the prosecutor, S. 1407 would seriously undermine the judiciary's independence. Fairness and impartiality are the hallmarks of our judicial system. These principles would be compromised by requiring courts to opine upon and, indeed, to influence the decision whether to continue the prosecution of a particular case.

Finally, the decision to dismiss a lawsuit is only one of several prosecutorial judgments that are made in the course of any case, including the decision to open an investigation, the decision to file suit and even the decision to appeal from an adverse judgment. By imposing additional burdens on the Justice Department only when it seeks to dismiss a lawsuit, S. 1407 would create an incentive for the Department simply to exercise its judgment as to whether to pursue a particular case at an earlier stage in the process. As a result, the effect of S. 1407 may be to discourage the Department of Justice from bringing civil antitrust actions that it otherwise would bring.

Given the seriousness of the problems that arise from requiring courts to review prosecutorial decisions, such a requirement is unnecessary in the civil antitrust context. First, relatively few civil antitrust cases are dismissed. Of those cases that are dismissed, many are non-controversial -- for example, the dismissal of a merger suit when the parties to the merger have decided to abandon the transaction. Second, when the Department of Justice dismisses an antitrust case with continuing significance, historically it has issued a statement explaining the rationale for its decision. Third, dismissals are subject to public scrutiny and review. Congress has the authority to scrutinize such decisions in its oversight role and the public, ultimately, will review a given administration's prosecutorial policies through the political process. Fourth, there is no reason to believe that, absent the review requirement, antitrust violations will go unpunished. Even if the Department of Justice errs in its judgment with respect to a particular case, private parties or the state attorneys general may bring suit. Finally, if the dismissal is the result of prosecutorial impropriety, the courts already have the authority to review and reject the dismissal on this ground.

V. Section 7: The Monfort Amendment

Section 7 of S. 1407 would amend Section 16 of the Clayton Act, in order to overrule the Supreme Court's decision in Cargill, Inc. v. Monfort of Colorado, 107 S. Ct. 484 (1986). Monfort held that a private plaintiff seeking to enjoin a merger is required to demonstrate threatened "antitrust injury" -- injury of the same type required to support a treble damage action under the Court's earlier decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). In Monfort, as in Brunswick, the plaintiff was denied relief because the alleged threatened injury stemmed from increased competition, rather than from any lessening of competition.

Monfort draws a sensible line between those competitor suits that will further the public interest in competition and those that further the interests of the individual plaintiff at the expense of competition. Contrary to the premise of S. 1407, Monfort does not preclude competitor standing in all merger cases: it merely requires, consistent with the decade-old Brunswick decision, that a plaintiff-competitor allege threatened antitrust injury. Indeed, the Supreme Court in Monfort expressly rejected the notion that competitors should never have standing to challenge acquisitions on the basis of threatened predatory pricing. [11/] The only suits prohibited by Monfort are those in which the plaintiff contends that it will be injured by an increase in competition, or otherwise fails to allege antitrust injury.

A. Competitor Standing

Those who favor overturning Monfort argue that competitors should be allowed to challenge mergers even if they themselves suffer no antitrust injury because consumers, those most directly impacted by anticompetitive transactions, do not normally have the requisite resources or information. The difficulty with this argument is that competitors are likely to challenge precisely the wrong acquisitions.

It is beyond dispute that some horizontal mergers create more efficient firms. Competitors have a strong incentive to challenge such transactions because they will be "injured" by increased competition from their now more efficient rival. The threat of such suits could deter or delay such procompetitive mergers, and in those circumstances the only entity to gain would be a competitor that will have used the antitrust laws to stifle rather than promote competition. Competitors, on the other hand, have little or no incentive to challenge those mergers whose principal effect is to facilitate collusion because a merger that decreases competition in this manner benefits all competitors by the promise of supracompetitive profits.

[11/] Since the decision in Monfort, a competitor has in fact successfully challenged a combination of two of its competitors. See Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250 (E.D. Pa.), appeal dismissed, Nos. 87-1091 and 87-1132 (3rd Cir. Oct. 16, 1987). Thus, there is no basis for the assertion that Monfort has foreclosed all competitor suits; the lower courts are certainly not interpreting Monfort that way.

A decrease in government merger enforcement activity may be cited in support of the proposed provision. To the extent that such a decline has occurred -- and there is considerable dispute about that -- allowing a competitor automatic standing simply does not address the problem. By permitting competitors to thwart or deter procompetitive combinations, the bill would only hurt consumers and the economy in general.

Some critics of Monfort, while acknowledging that a competitor's principal motivation is to challenge mergers that are likely to increase competition, argue that the competitor's motivation is irrelevant because -- in the end -- the courts will enjoin only those mergers that genuinely threaten to lessen competition substantially. This argument is flawed because it fails to recognize the time-sensitive nature of many acquisitions. A study by the ABA Section of Antitrust law, for example, shows that the delay inherent in pursuing a merger case even through the preliminary injunction stage can kill the transaction. 12/ Indeed, our study reveals that very few merger transactions proceed to a full trial on the merits once a preliminary injunction has been granted.

The Monfort rule, by requiring a competitor-plaintiff to demonstrate that its injury will flow from the anticompetitive consequences of a transaction, gives the courts an additional means of determining whether a merger is likely to lessen competition substantially. S. 1407, on the other hand, by granting automatic standing to competitors, effectively deprives the courts of this important and useful information. Because the Monfort rule assists the courts in distinguishing between procompetitive and

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12/ ABA Antitrust Section, Monograph No. 1, Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act Policy and Law 33-35 (1977).

anticompetitive mergers, and therefore decreases the risk that procompetitive mergers will be abandoned or blocked, it should be preserved.

B. *Target Standing*

S. 1407 would also very likely give targets of takeover attempts automatic standing to challenge a takeover under the antitrust laws whenever the acquiring company and the target are direct competitors. This result would also represent a major change in the law. Whereas prior to *Brunswick*, target standing was often assumed, since *Brunswick* targets have had a far more difficult task establishing *antitrust* standing. [13/]

Target standing presents issues very similar to those analyzed above in the context of competitor standing. Allowing target management generally to assert antitrust objections could effectively thwart many pro-competitive transactions. As with competitors, the motive of target management in challenging takeovers may be self-preservation rather than preventing a reduction in competition. Indeed, in the case of a truly anticompetitive takeover, the new entity's market power would presumably increase, thus benefitting the target as well as the acquiring company and reducing the incentive to challenge the takeover.

[13/] Standing has been granted to target-plaintiffs in the second and sixth circuits. *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378 (6th Cir. 1981), *cert. den*, 455 U.S. 982 (1982). Standing has been denied in the third, seventh, and tenth circuits. *See H.H. Robertson Co. v. Guardian Indus. Corp.*, 1986-1 Trade Cas. (CCH) ¶ 66,911, (3d Cir.), *appeal dismissed*, Nos. 85-3232 and 85-3233 (3rd Cir. May 15, 1986) *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986); *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183 (10th Cir. 1983). The decision in *Carter Hawley Hale Stores, Inc. v. The Limited, Inc.*, 587 F. Supp. 246 (C.D. Cal. 1984), typifies the reasoning of this line of cases in rejecting standing on the grounds that any target injury does not result from the competitive effects of the takeover. *See also Burlington Indus., Inc. v. Asher B. Edelman*,. No. 87-274-G (M.D.N.C. June 5, 1987), *aff'd* Nos. 87-1622, 87-1623, 87-1626 and 87-1628 (4th Cir. June 22, 1987).

The issue of target standing should be resolved by the courts on a case-by-case basis, employing the standards set forth in Brunswick and Monfort. Under current law, targets have standing when they are able to allege antitrust injury. This is the proper standard.

Senator **Metzenbaum**. Thank you very much, Mr. Rill. I appreciate your acknowledging our light control system.

Mr. Cuneo, we are happy to have you with us, sir.

STATEMENT OF JONATHAN W. CUNEO, GENERAL COUNSEL, COMMITTEE TO SUPPORT THE ANTITRUST LAWS, WASHINGTON, DC

Mr. **Cuneo**. Thank you very much, Mr. Chairman, for the opportunity to speak today.

My written testimony is mostly addressed to the claims reduction issue, and I do not plan to address that orally. So I ask that that be included in the record.

Senator **Metzenbaum**. Without objection, all statements will be included fully in the record.

Mr. **Cuneo**. I think that in at least two respects today's hearing demonstrates the difficulty that people like you—people who are interested in serious antitrust enforcement—face. The testimony today is in the main from big business and the organized bar and, unbelievably enough, from the antitrust enforcement authorities themselves. A common theme of the testimony is that each witness has asked you to weaken the private damage system that exists for the protection of consumers and competition. I think that that shows the difficulty of your task. Before the hearing, I would have said that you should be commended for keeping your finger in the dike. Now, I think that you have got both your hands and legs in the dike. I think that you should be congratulated.

A second aspect that is striking about the hearing today was something that you touched on in your questions to Mr. Rule and Chairman Oliver about the States' insurance case. As I understood their testimony, what they essentially said is that they had no personal knowledge of whether the allegations in the complaint were accurate or whether they were not. And I certainly have no personal knowledge either, so like them, I do not know firsthand whether the lawsuits are meritorious or not.

They also said that no one brought them a case, and that, accordingly, they did not feel that they had enough evidence to proceed. From this, I infer what they really mean is that they had no idea whether the meetings that are alleged in the complaint took place or not, and, if so, what took place in those meetings.

They also referred to the enhanced enforcement powers of the States. They said as an antitrust enforcement matter it was a sensible allocation of resources for a matter of this type to be handled by the States.

Regardless of whether the States have the right to handle this or not, what you have is an allegation of a global conspiracy of breathtaking proportion. This is not an antitrust case that involves two grocery stores in a small town. It is something of tremendous significance across the country. The people who are allegedly affected by it stretch across the country—from California, or I should say Hawaii, to Maine. It is not something that is confined to Texas or West Virginia or even California, for that matter.

It is clear that if there is merit to the suit, a successful prosecution might very well involve the full weight, resources and credibility of the U.S. Government. It is certainly possible, in light of the international allegations that have been made, that there will be sensitive foreign policy considerations involved. The case might also require the huge resources that are really most concentrated in the Antitrust Division and the Federal Trade Commission.

Finally, it struck me that, what you have involved here is the interpretation of a major piece of Federal legislation, the McCarran-Ferguson Act.

For all those reasons, it strikes me that it would be sensible for the antitrust enforcement agencies of the United States to examine the allegations that are involved in this case. For them to say that, well, no one brought them a case is ridiculous. The reason that you appropriate a budget for them is so that they can go out and investigate things for themselves. That is the reason.

I wanted to quickly address one particular aspect of your legislation that I did not touch in too great detail on in my written testimony, and that is the *Monfort* aspect. Essentially, a decision on a merger is unlike any other antitrust decision because you are judging things before they happened, not afterwards.

What the *Monfort* decision does is to ask the plaintiff to bear the burden of proving what will happen after a merger when there is no way he could know in advance. For that reason, I think that your change is necessary to carry out with the inefficiency standard of section 7.

Thank you.

[The prepared statement of Mr. Cuneo follows:]

Prepared Testimony of

Jonathan W. Cuneo

General Counsel

Committee to Support the Antitrust Laws

Before the

Subcommittee on Antitrust, Monopolies and Business Rights

Senate Committee on the Judiciary

March 31, 1988

Good morning, Mr. Chairman and Members of the Subcommittee. I'm Jonathan Cuneo and I practice law in Washington. I serve as General Counsel of the Committee to Support the Antitrust Laws. I very much appreciate the opportunity to present testimony in the Subcommittee's continuing examination of the current system of antitrust remedies.

I.

Before the Subcommittee are two bills, S. 1407 and Title II of S. 635. These bills represent conflicting points of view on the existing system of antitrust remedies. They differ in premise, scope and intended effect. We are generally extremely supportive of S. 1407, and we oppose Title II.

Senator Metzenbaum's bill, S. 1407, proposes a series of adjustments to the current system of antitrust remedies, each of which can fairly be said to reinforce and strengthen the existing system of remedies. The major premise underlying Senator Metzenbaum's bill is that the current system of public and private enforcement is basically sound, but, like many systems, is in need of an occasional tune-up. The changes that Senator Metzenbaum has proposed are designed to extend and augment the existing system in areas where statutory anomalies exist (e.g., the Tunney Act provisions extending its notification requirements to dismissals) or case law seems to cramp the full effect Congress intended in creating a dual system of public and private enforcement (e.g. the provisions dealing with the rights of competitors to challenge mergers in the wake of the Supreme Court's Monfort decision). Although there is clearly a basis for concern about federal government usurpation of private cases in creating a federal parens power, Senator Metzenbaum's bill taken as a whole represents a considerable improvement over existing law.

II.

Title II sets forth far-reaching changes that go in the opposite direction of S. 1407. Apparently premised on the belief that current law is somehow tilted in favor of alleged victims -- a belief we vigorously contest -- Title II would overhaul the system of private enforcement to weaken the legal protections available to victims of law violations. At the same time, it would strengthen the hand of violators and alleged violators in civil litigation. We believe in the current system and vigorous law enforcement; we therefore oppose these changes.

Like the Adminstration's proposals of approximately two years ago to "reform" the system of private antitrust remedies, Title II contains three essential concepts: claims reduction, "detrebling" and attorneys' fees for some prevailing defendants. Each of these would severely and adversely affect the ability of a victim of an antitrust conspiracy to obtain compensation for his or her injuries from the perpetrators of that violation. As a matter of public policy, each of these proposals would diminish the important deterrent effect flowing from an effective system of private antitrust remedies.

Before turning to the specifics of the "claims reduction" proposal, it's important to keep the "reform" movement in perspective. We are told that one major reason Congress should weaken our national commitment to domestic competition and antitrust is out of concern for our place in the world economy. As far as I am aware, there is no credible evidence -- much less convincing evidence -- that tearing apart the country's system of antitrust laws and remedies would in any way shore up our position with respect to our trading partners.

On the contrary, the American economy as a whole has experienced economic growth and prosperity unparalleled by any economy in history during the decades that the current system of antitrust prohibitions and remedies has existed. Indeed, there can be no question that our country's commitment to free and fair competition as embodied in the antitrust laws is a major reason for the economic miracle that has taken place this century. Although the current Chicago School "reformers" heavily criticize the court decisions and vigorous enforcement policies of the 1960's, our economy in that decade grew for years in a stable, noninflationary manner -- without significant budget deficits. In stark contrast, today's "competitiveness" problems exist against a backdrop of seven years of lax enforcement policies. This and other evidence demonstrates that Congress should be extremely wary on cutting back the rules of free competition in the name of "competitiveness."

III.

Because the Senate Judiciary Committee has in the past approved a claims reduction bill, I would like to discuss that aspect of Title II in particular. Claims reduction is, as its name suggests, a proposal through which the recovery of a victim would be reduced if the victim sued less than all conspirators and or settled with some conspirators. Unlike contribution, which allocates responsibilities among conspirators, claims reduction reduces the amount that conspirators pay victims.

This claims reduction proposal would in effect establish a partial defense to an antitrust case through which conspirators found liable could reduce the damages they pay by showing that other conspirators who were not sued or who settled received a portion of the ill-gotten gains or shared responsibility for the origination or perpetration of the violation. This claims reduction right would exist in favor of the defendant found liable regardless of (1) whether the victim were fully compensated for his or her injury or (2) whether the defendant had been convicted of criminal price fixing.

No reason exists for Congress to create a claims reduction right for defendants and strong public policy considerations counsel against any such step. In addition, the current mandatory claims reduction proposal contains defects that are likely to wind up creating the adverse consequences proponents of claims reduction are seeking to avoid.

Let's briefly examine the argument in favor of claims reduction. As I understand it, the alleged "problem" that claims reduction seeks to address is the litigation flexibility arising from joint and several liability. Because liability for an antitrust conspiracy is joint and several (as well it should be because a conspiracy is the classic example of joint conduct), a victim can choose to sue some or all violators to recover its damages. Under current practice, a victim can settle with some defendants and the remaining defendants remain liable for the full damage award (minus the amounts paid in settlement). This flexibility is said to lead to a so-called "whipsaw" effect in which defendants left in a case after others have settled are exposed in a more focused way to the remaining damage claims. Proponents claim that this is undesirable because it creates increasing settlement pressure and "coerces" settlements from "innocent" defendants.

The most that can be said for this argument is that in the long history of private enforcement and the thousands of cases that have been brought, there are only a handful of instances in which it has even been alleged that the system of joint and several liability operated "unfairly." So infrequent is the problem that the idea of a contribution and claims reduction scheme did not even emerge as a serious legislative proposal until the very end of the 1970's. And, so far as I am aware, there is not a single claim of alleged "unfairness" in the past five years.

Defendants in many cases now use "sharing agreements" to allocate the damages for themselves.

Claims of "unfairness" are, of course, easy to make, particularly after the conclusion of a case. So far as I am aware, Congress has never requested the full records of any case to determine for itself whether any defendant was treated unfairly, nor has it assessed how frequently any "problem" arises. In sum, the proponents for legislative change have not made the case. Congress should not accept sparse, outdated and anecdotal evidence as a basis for casting aside the long-standing rule of joint and several liability.

There are a host of public policy arguments against creating a right of claims reduction, of which two are of particular importance. First, Congress should not take money away from victims and give it to law breakers. It is in the horizontal price-fixing context that proponents see the greatest need for legislation. Unlike the current broad proposal, the contribution/claims reduction proposals in the 96th and 97th Congresses applied only to horizontal price-fixing. Yet, horizontal price-fixing is among the most serious antitrust offenses and is frequently criminal in nature. Even the current Antitrust Division of the Department of Justice recognizes that "American consumers and taxpayers pour billions of dollars each year into the pockets of price-fixers and bid-riggers. People who take consumer and taxpayer money in this way are thieves."[1] Would Congress allow bank robbers or con artists to avoid liability on the grounds that their co-conspirators actually received the loot? Of course not. Price-fixing is no different. Congress should not create a "share of the loot" defense for price fixers -- "thieves" who are stealing "billions" of dollars per year through their price fixing.

Second, Congress should either have faith in the legal system or work to improve it. As a conceptual matter, underlying the claims reduction proposal is a fundamental lack of confidence in the system of justice. Proponents claim that escalating settlement pressure is "unfair" because it "coerces" settlements. Boiled down to its essentials, the premise is that, if the stakes get large enough, innocent defendants will not pursue their rights to vindicate themselves at trial because of the fear that a fact-finder will make an incorrect determination of guilt. Because lawyers should not be asked to "bet the company," the argument goes, Congress should legislate reduced stakes for defendants who go to trial.

While this argument has a nice ring to it, the very nature of settlements and plea-bargains is coercion. Defendants settle or plea bargain not because they want to, but because the risks of trial outweigh the price of settlement or the penalty of a plea-bargain. They are unwilling to "bet" on the outcome of a trial.

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[1] "Antitrust Enforcement and the Consumer,"at 6 (emphasis added).

The stakes involved in a trial can be far higher even than the large sums of money involved in antitrust cases. In some criminal cases, the risks of trial include long periods of imprisonment or imposition of the death penalty; in these instances, lawyers "bet" more than their client's money on their legal judgment on the outcome of a trial. Looked at in this broader perspective, it is clearly misconceived to legislate claims reduction so that antitrust defendants will not be "coerced" by escalating settlement pressure.

Finally, claims reduction is very likely to have some extremely serious negative practical consequences that will undermine the purpose of the legislation. As noted above, the alleged "harm" that claims reduction seeks to address is the flexibility that joint and several liability affords. There are significant advantages in that flexibility, apart from the tool it affords victims. Plaintiffs can sue less than all members of a conspiracy and accept settlements from some without jeopardizing their right to a full recovery. This flexibility reduces the number of parties to litigation and promotes early settlement of claims. It also permits plaintiffs to accept "hardship" settlements from defendants with a low net worth.

The current claims reduction proposal requires a dollar for dollar reduction for amounts allocated to settling defendants and "available" conspirators that the plaintiff did not pursue. In place of a system of maximum flexibility, Title II would substitute a system of no flexibility. If a potential conspirator is available, the plaintiff must sue or else face the possibility that the conspirator will later be deemed to have been "released" by operation of law. Similarly, in accepting a settlement, the plaintiff is accepting the loss of all damages later found to be allocable to that defendant. Thus, a plaintiff will have an incentive to sue all possible parties, even when the evidence against some is thin. Plaintiffs will have no choice but to litigate their claims against all parties and will not be able to accept "hardship" settlements. The likely effect of such a rigid claims reduction scheme is an increase in baseless claims, a vast complication of litigation and an upsurge in business bankruptcies. Thus, even if one were to conclude that there is too much flexibility in the current system, rigid claims reduction is not the answer.

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Thank you very much for the opportunity to present these views.

Senator **Metzenbaum**. Thank you very much.

Mr. Cuneo, in order to be fair, I had some inquiry of Mr. Rill as to who really the ABA's Antitrust Section is and where they are coming from. Could you tell us who the Committee to Support the Antitrust Laws is and how you are funded?

Mr. **Cuneo**. Sure. The Committee to Support the Antitrust Laws was founded in 1986, and its purpose is to work for a strong body of antitrust laws in the United States and its political subdivisions. Its membership is currently open to anyone. It is funded by dues-paying members who are at this time law firms across the country.

Senator **Metzenbaum**. And are most of those law firms plaintiffs' law firms?

Mr. **Cuneo**. Many of the lawyers have had significant involvement on the plaintiff side, but I think it would be unfair to characterize the group as solely a plaintiffs' group. A lot of our members do a significant amount of defense work and counseling, Senator.

Senator **Metzenbaum**. Have they pointed out to defendants' lawyers that they cannot make any fees unless the plaintiffs are able to have laws that make it possible to bring actions?

Mr. **Cuneo**. I am quite certain they understand that, Senator. [Laughter.]

Senator **Metzenbaum**. Mr. Rill——

Mr. **Rill**. I hope you are not going to ask me to respond to that question, Senator.

Senator **Metzenbaum**. No—which was said, as you realize, with levity.

Mr. **Rill**. I understand.

Senator **Metzenbaum**. But I have heard defendants' lawyers come up to me and say, "We do not have anything to defend anymore. There are not many antitrust cases being brought."

You state in your testimony that the ABA agrees with the reasoning of the Supreme Court in the *Monfort* case, and there are no changes needed to give standing to competitors to challenge a merger. But the *Monfort* case raised the problem that no private party can challenge a merger.

Let us say that two of the only three supermarkets in a city merge or two of the three car dealerships merge. No private party can sue except as an individual consumer, and that is totally impractical. Justice Stevens wrote in his dissent, "It would be a strange statute, indeed, which defined a violation enforceable by no private party."

Isn't he pointing out a real problem?

Mr. **Rill**. I do not agree with the premise stated. You correctly state Justice Stevens' premise. I do not agree with that premise. I think that *Monfort* has been overread to categorically deny standing to competitors as private litigants challenging a merger. I think that is simply a misreading of it.

It seems me that a competitor in a particular market does have standing if it can make a demonstration based on something beyond mere allegation that it is likely to suffer antitrust injury as a consequence of the acquisition. Just the other day, the fifth circuit, while denying standing in the *Phototron* case, observed that a private litigant competitor would have standing to challenge, in that case a joint venture, Kodak and Colorcraft, if it could make a demonstration based on some evidence that the likelihood of predatory pricing, for example, would arise as a result of the acquisition. The problem in that case, as I understand the court of appeals decision, was that the evidence did not go beyond mere allegation.

The District Court in Philadelphia in the *Tastykake* case, which was subsequently settled, did give the plaintiff competitor standing after *Monfort* to challenge the acquisition by Ralston Purina of Drake, based not so much on predatory pricing—although that was a factor—but evidence of shelf allocation opportunities and capacities in the retail business for snack cakes and pies.

So I think that *Monfort* has been overread. I think it is entirely an appropriate decision in that I have a concern that if private parties are given automatic standing, what will arise will be competitors who are attempting to challenge the efficiencies that result from an acquisition by their competitors, will have an opportunity unduly to throw a monkey wrench into the works of the acquisition, even to the preliminary injunction stage where a final decision on the merits does not need to be made by the judge.

That, I think, is the aspect of the legislation that troubles us.

Senator METZENBAUM. Am I correct that the ABA would support the provisions of S. 1407 applying the Tunney Act to modifications if it were restricted to modifications of substantive provisions of consent decrees?

Mr. RILL. I think it certainly would support at least that. I think that all we are suggesting by way of our amendment to your proposal is that where the court believes there is a routine modification that is called for, that the court has the option to waive some of the provisions of the Tunney Act. So I would say, yes, we at least go that far and possibly farther.

Senator METZENBAUM. Mr. Cuneo, who would the administration's claims reduction provision benefit, in your opinion?

Mr. CUNEO. I think it would greatly benefit defendants in cases. I think it would most benefit people who had been found guilty of antitrust violations in a civil case.

Senator METZENBAUM. And who would it harm?

Mr. CUNEO. I think it would harm plaintiffs and consumers.

Senator METZENBAUM. Do you believe that passage of the administration's claims reduction proposal would lead to fewer settlements and more trials of antitrust cases?

Mr. CUNEO. Oh, unquestionably. I think that that is what it is designed to do. It is designed to discourage settlements.

Senator METZENBAUM. And who would ultimately pay the cost for this increase in litigation cases?

Mr. CUNEO. I think that the primary incidence would fall on the courts. I think that the victims of antitrust violations would bear it as well.

Senator METZENBAUM. At this point, the chairman is going to leave for another commitment that I have. I turn the meeting over to Senator Specter, who I think has some questions for Mr. Rill and Mr. Cuneo. Then he will be able to conclude his inquiry of Mr. Oliver and Mr. Rule.

Thank you very much.

Mr. RILL. Thank you very much, Mr. Chairman.

Mr. CUNEO. Thank you, Mr. Chairman.

Senator **Specter**. I have no questions of Mr. Rill and Mr. Cuneo. As I said before, I will waive those and try to finish up very promptly with Mr. Rule and Mr. Oliver.

Senator **Metzenbaum**. Thank you very much.

Senator **Specter**. If Mr. Rule and Mr. Oliver would step forward again, I will try to make this as brief as possible.

Mr. Rule, in the exchanges which we have had so far, you have testified that it was a pretty clear matter so far as the Department of Justice was concerned because you had extensive experience in the markets. On March 17, I wrote to you asking that the Justice Department utilize the statute to request additional information from Beazer, and I got a response back from Mr. Boyd, acting assistant attorney general of the Office of Legislative Affairs, further acknowledging the letter and saying that further response would be forthcoming as soon as possible.

The question I have is: Is it realistic to expect that you would respond to me when you had made up your mind that you were not going to have a request for additional information to say so? The letter is sent on the 17th of March. You get in on the 18th. Thereafter, I get a response on the 22nd. What I am really looking toward is, what is it realistic for a Senator to expect by way of an answer to know what your thinking is so that I can act accordingly as I see fit, on oversight and on a constitutent request.

Mr. **Rule**. As I understand it, the response that you have just indicated or alluded to is a standard response that the Office of Legislative Affairs sends out upon receipt of correspondence from important folks such as yourself.

Senator **Specter**. Well, the letter was not to the Office of Legislative Affairs. The letter was to you.

Mr. **Rule**. But when it comes to—again, this is the way the Department has done these things—when correspondence comes from a Senator or from a Congressman, the standard operating procedure now is for the head of the Office of Legislative Affairs to communicate a response. They are the ones who receive it. They try to make sure by sending out a letter that you, and I think that Senator Heinz, who also signed the letter, were aware that we had received the letter.

Senator **Specter**. By this time you had entered into a consent decree. Shouldn't we at least be told that there was a consent decree entered into?

Mr. **Rule**. I apologize if you feel that we did not——

Senator **Specter**. No apology is necessary, Mr. Rule. What I am trying to find out is: What is it realistic to expect? I write you a letter on the 17th. I get an acknowledgment back on the 22nd. In the intervening time, you have already entered into a consent decree. I do not know what is happening. I am making an inquiry. I would hope you could give me an answer so that I would not read about it is the newspapers or find out about it from Koppers.

My question is: Is that too complicated, given the burdens of your work load?

Mr. **Rule**. I do not think it is too complicated, and I apologize. I perhaps, in retrospect, should have picked up the phone and called you and/or Senator Heinz because Senator Heinz——

Senator **Specter**. Well, it would be helpful if we would at least know what is happening. Senator Heinz and I wrote to you then again on March 25 raising the questions about why you had not asked for the second line of inquiry, and we would just like to know what your thinking is on it. That is really the point of the letter.

Mr. **Rule**. Sure. And as I indicated earlier, I hope and believe that I will, when I am able to get back to the Department, get you a response this afternoon.

Senator **Specter**. All right. Now you are referring to the letter that I wrote you on March 28 and had hand-delivered and asked for a response by the 31st, because this is our last day before break. And I realize that it is burdensome to ask you to respond in this length of time. And I appreciate your information which you have transmitted to me earlier orally that you would get a response today.

I am going to, without objection—since there is no one else here to object—put in the record all of these letters.

[The letters of Senator Specter follow:]

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

March 17, 1988

The Honorable Charles F. Rule
Assistant Attorney General
Antitrust Division
Department of Justice
Room 3107
Main Justice
Washington, D.C. 20530

Dear Rick:

I am writing concerning the Antitrust Division's ongoing review of the Hart-Scott-Rodino filing by Beazer, PLC in connection with its attempted acquisition of Koppers Company, Inc., which is based in Pittsburgh, Pennsylvania and is a large employer in the western part of the state.

The attempted acquisition of Koppers by Beazer raises serious questions because it will result in a merger of two of the largest suppliers of construction materials in the country generally and in the southern California area in particular.

Although I do not know if this proposed acquisition presents insolvable antitrust problems, the presence of these serious questions makes it imperative that the Justice Department undertake a thorough and probing review pursuant to its responsibilities under Hart-Scott-Rodino. Accordingly, I am requesting that the Justice Department utilize its authority pursuant to 15 U.S.C. 18a(e) to request additional information from Beazer and thoroughly review this proposed transaction before making a final determination.

I would appreciate being kept apprised of any developments in this matter, and I thank you for your consideration of this request.

Sincerely,

Arlen Specter

AS:jr

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

March 22, 1988

Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

This is to acknowledge receipt of your letter of March 17, 1988, to Charles F. Rule, Assistant Attorney General, Antitrust Divison, received by the Department on March 22, 1988, regarding the attempted acquisition of Koppers Company, Inc., by Beazer.

A further response will be forthcoming as soon as possible.

Sincerely,

Tom Boyd

Thomas M. Boyd
Acting Assistant Attorney General

United States Senate
WASHINGTON, DC 20510

March 25, 1988

The Honorable Charles F. Rule
Assistant Attorney General
Antitrust Division
Department of Justice
Room 3107
Washington, D.C. 20530

Dear Mr. Rule:

We are writing to follow up on our earlier communications concerning the Antitrust Division's review of the antitrust implications of the proposed takeover of Koppers Company, Inc. by Beazer, PLC and affiliated companies.

We are concerned by the speed with which the Division acted in reviewing the substantial antitrust problems raised by this proposed transaction and entering into a proposed consent decree that purports to solve those problems. As you well know, the provisions of Hart-Scott-Rodino explicity authorize the Department to issue a second request for information when an initial review of a proposed transaction reveals adverse antitrust implications. Given that the Division concluded during its initial review that this transaction did create antitrust problems, we believe that it would have been appropriate to issue a request for additional information and conduct a thorough investigation before entering into a consent decree.

We hope that the Division will continue to review this transaction and solicit additional information concerning the full range of antitrust problems it will potentially create. We trust that the Division will not hesitate to exercise its rights under the proposed consent decree and withdraw its approval should that additional investigation reveal antitrust problems that remain unresolved.

Please keep us informed of developments in this matter. Your cooperation will be appreciated.

Sincerely,

JOHN HEINZ

ARLEN SPECTER

JR

United States Senate

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March 28, 1988

The Honorable Edwin Meese, III
Attorney General
Department of Justice
Washington, D. C. 20530

Dear Attorney General Meese:

I am very much concerned about the propriety of the Antitrust Division's action on the efforts of Beazer, PLC to take over Koppers Company, Inc. after reviewing the legal issues in some detail today with Koppers' counsel, John Bodner, Esquire.

According to information provided by Mr. Bodner to me, answers are required on:

1. Why did DoJ enter into a proposed settlement decree with Beazer on March 18 when Koppers' counsel was in the midst of on-going discussions with DoJ and Koppers had not yet finished supplying important documents to DoJ?

2. Why did DoJ not seek more information from Beazer by utilizing the customary second request provisions in light of the obvious and serious antitrust issues?

3. Why did DoJ act in a way which may have precluded the Court from the full opportunity, consistent with the 60 day procedure, to pass on the adequacy of the relief in the public interest before allowing the takeover to take place?

4. Did DoJ act in good faith or not in moving forward with a proposed consent decree with Beazer at the same time DoJ appeared to be working with Koppers' counsel to get all the facts to determine if there was an antitrust violation?

Mr. Bodner has outlined a detailed sequence which requires a thorough explanation on these issues. According to Mr. Bodner: Beazer announced its takeover effort on March 3, activating a 15 day period for reports to DoJ and FTC under the provisions of Hart-Scott-Rodino; during that 15 day period after Beazer filed under Hart-Scott-Rodino, Koppers had that time period to file a reply and during the 15 day period the takeover could not be consummated; Mr. Bodner and other attorneys met with DoJ lawyers in San Francisco during the week of March 14 raising allegations of violations of section 7 regarding cement, ready-mixed concrete and aggregate materials; extensive documents were provided by Mr. Bodner to DoJ officials in San Francisco on Wednesday, March 16, Thursday, March 17, and Friday, March 18; contemporaneously with those activities, DoJ prepared elaborate documents including a complaint, a proposed decree and a competitive impact statement, requiring coordination among DoJ officials in Washington, San Francisco and Los Angeles with the proposed decree being filed on March 18.

According to further information provided by Mr. Bodner, he filed an action for a temporary restraining order which was granted by Chief Judge Manuel L. Real on March 25. While I have not yet had an opportunity to examine those legal papers, Judge Real's order indicates that the action of the Department of Justice was inappropriate and had to be halted.

I am calling this matter to your personal attention in this detail because of the serious issues raised on the propriety of the DoJ administration of the antitrust law and also because of the serious potential impact on Koppers, a major Pennsylvania company which employs more than 11,000 people nationally and more than 3,000 people in my state.

As a member of the Antitrust Subcommittee of the Judiciary Committee, there are obvious Congressional oversight issues which require an answer.

As a Pennsylvania Senator, I am very much concerned to be sure that the appropriate legal procedures are followed on a tender offer which could have a serious economic impact on many of my constituents. I am informed that the announced plans of Beazer and its collaborators to sell off the chemicals and allied products would put the jobs of more than 1,100 Pittsburgh employees at risk. In addition, Koppers has extensive operations in Harrisburg, Scranton, York, State College, Williamsport, Easton, Downingtown, and Glen Mills in Pennsylvania.

For these reasons, both from the national point of view on the administration of U.S. antitrust laws and from a Pennsylvania point of view on a serious impact on many cities in my state, I request your prompt response to these important issues.

Sincerely,

Arlen Specter

I would appreciate your response by 3/31/88 because I would want to move ahead to activate an oversight hearing by our Anti-trust subcommittee if I [illegible] that is NECESSARY

AS:jb

cc: The Honorable Charles F. Rule

HAND DELIVER

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March 28, 1988

Chairman Daniel Oliver
Federal Trade Commission
Pennsylvania Avenue at Sixth Street, N.W.
Washington, D. C. 20580

Dear Chairman Oliver:

With this letter, I am enclosing for you a copy of a letter which I have today sent to Attorney General Meese.

I would urge your Commission to act as promptly as possible to determine if Beazer, PLC has complied with the requirements of Hart-Scott-Rodino.

An issue has been raised as to whether Beazer acquired Koppers' stock at an earlier date through surrogate purchasers. If so, Beazer may have been under an obligation to act at an earlier date under Hart-Scott-Rodino.

Since time is of the essence for reasons detailed in the accompanying letter to Attorney General Meese, I would very much appreciate your prompt action on this matter.

Sincerely,

Arlen Specter

AS:jb
Enclosure

Senator SPECTER. This really goes to the oversight function as to what our requests are, what you can respond to, what you have personnel for, what you have enough money to do. And we are not trying to make your life burdensome and intolerable. We are just trying to find out.

Mr. RULE. Senator, I try to provide as much information as I can to the people in Congress. I am very respectful of you and the positions you hold. And I am sorry that on occasions when we do not give you as quick a turnaround as we probably should and give you as much information as you feel you need.

The one thing I will say, and I just want to mention this so you understand: It is difficult when there is a matter that is either potentially in litigation or actually in litigation to get involved in discussions that are outside the context of the litigation. I tried to go as far as I could this morning in discussing and trying to answer your questions. I certainly understand your oversight concerns, and I understand that you want to do it immediately.

Sometimes I may be able to be more forthcoming once the litigation is concluded, but it is very difficult for me, given our responsibilities to the court, to try to be as forthcoming as I know you would like.

Senator SPECTER. Mr. Rule, I think you have answered all the questions today. There is some limitation because of pending litigation. That generalization is overused. You have not overused it; you have made reference to it to protect the record, so to speak. But you have answered the questions. I think it has been fine.

My point only goes to that when you get these letters, if you would place a call and you do not get me, give my secretary a message or else give your secretary a message to give to my secretary. All I want to know is what the facts are. I do not want any long letters.

Mr. RULE. I will be happy to do that. I must admit, I am always reluctant to bother Senators.

Senator SPECTER. Even when he has written to you?

Mr. RULE. Well, I assume that they want a written response, and given how busy you are—but I will be happy to call you, if you would like me to.

Senator SPECTER. I think we would be just delighted if you said to your secretary: Call the Senator's secretary and tell her X, Y, and Z, and we will get to it more fully when we can.

Mr. RULE. OK. I will do that in the future.

Senator SPECTER. Let me ask you now about your procedure with respect to the Attorney General, and I think this is a fair question based on the record at this point.

I directed this letter to Attorney General Meese because I felt it was a matter for his personal review, and I had it hand-delivered on March 28. I had calls made telling you that it was on its way so that you would be alerted to it, knowing the vagaries of the mail system.

Do you know whether Attorney General Meese has had an opportunity to review my letter?

Mr. RULE. I really do not know, sir. I have not talked to him about it.

Senator **Specter**. Have you discussed the Beazer issue with him at all?

Mr. **Rule**. Yes, I have. I briefed him very shortly after we filed the consent decree and explained to him what we had done and what the procedures were. And I discussed or at least informed people upstairs, so to speak, of what is happening with the matter now and how it is proceeding. But I have not personally talked to the Attorney General about it.

Senator **Specter**. Did you confer with Attorney General Meese prior to the Justice Department's decision to enter into the consent decree to allow Beazer to take over Koppers?

Mr. **Rule**. Again, I really hate to go into the internal deliberations, but I can tell you that the way the antitrust——

Senator **Specter**. I am not asking about deliberations. I am really just asking about whether Mr. Meese passed on it.

Mr. **Rule**. OK. Let me give you the general idea—so I can get away from talking about specifics—of how matters are handled in the Antitrust Division.

Senator **Specter**. OK. We will start there.

Mr. **Rule**. And it is no different today than it was a year ago or, so far as I know, 8 years ago.

The way the matters come in, I am authorized—in fact, I have delegated, or an assistant attorney general before me some time in the past has delegated—the responsibility and the ability to send out second requests to deputy assistant attorneys general. So a request for a second request goes to the deputy assistant attorney general who makes that decision, and he usually will inform me.

A decision on whether or not to file a case, both civil and criminal, at least since the middle 1970's, has been a function that has been delegated to the Assistant Attorney General in charge of the Antitrust Division. So I am authorized to and do file suits with the court. I sign them and I make the decision.

In this case, as with most cases, I inform generally the Deputy Attorney General and, through him, the Attorney General, of matters when they are going to be filed. But the decision, because it has been delegated to me, is a decision that I make—

Senator **Specter**. You are on now the second request issue?

Mr. **Rule**. No. This is now with respect to filing a case.

Senator **Specter**. Filing a case? And entering into a consent decree is delegated to you?

Mr. **Rule**. Yes.

Senator **Specter**. So that you have that authority without getting the approval of the Attorney General.

Mr. **Rule**. Right. Yes, sir. And that is——

Senator **Specter**. How long have you been in your position?

Mr. **Rule**. I have been in this position as acting since November 1986. I was confirmed and sworn in in August of 1987, and I have been at the Department now for almost 6 years.

Senator **Specter**. You made a reference to 8 years ago. Do you kow for a fact that it was the practice 8 years ago to have the Assistant Attorney General enter into consent decrees without the specific approval of the Attorney General?

Mr. **Rule**. Well, you know, I would obviously have to talk to Sandy Litvak, who was head of the Division then, or going back to

John Shenefield who was before him. But my understanding is that that has been the case. That certainly is the regulation.

It is true that prior to maybe 1975 or 1974, dating from the late 1930's, early 1940's that the Attorney General had to sign all complaints and all indictments. That practice changed though, and that is not the typical practice for most divisions. It changed in the middle 1970's, and that has been the standard operating procedure since then.

Senator SPECTER. All right. In a case where a Senator writes a letter to the Attorney General, as I did on March 28th—well, you do not know whether or not Mr. Meese saw my letter?

Mr. RULE. I have not talked to him about the letter, no, sir.

Senator SPECTER. Would it be your practice when a Senator in an oversight function writes a letter to the Attorney General to make an inquiry as to whether he has received the letter and has, in fact, considered it?

Mr. RULE. Let me put it this way: The Department's handling of congressional correspondence, responses, that sort of thing, is coordinated by the Office of Legislative Affairs and the Executive Secretariate, the Attorney General's Executive Secretariate, that refers correspondence for answers and that sort of thing. And so we get correspondence—for example, your letter—and prepare responses, that sort of thing.

Exactly who sends it out and who reviews it, I think, is a decision that is generally made, according to some rules, by the Executive Secretariate But normally, if it involves inquiries from Congress, as I understand it, we respond in the form of a letter from the head of the Office of Legislative Affairs. But, again, Tom Boyd or his predecessor, John Bolton, would be better able to answer that question.

Senator SPECTER. Well, all right. You have answered the question that you do not know whether Mr. Meese saw my letter of March 28 or not. Fair enough.

What I would like you to do, if you could supply me with the information by telephone—secretary to secretary would be fine—whether he had seen it prior to my inquiry of this morning; and if so, what his response was. And if he had not seen it prior to my inquiry this morning, if he had seen it between the time I inquired and the time you find out the information, I would be interested in his views because I think it is a matter which requires his personal attention. Obviously, that is why I wrote to him.

Mr. RULE. Sure.

Senator SPECTER. And that question has some more pronounced significance because there is an issue today as to the general operation of the Department of Justice for reasons which I need not specify.

Mr. RULE. I understand that. Let me just say, again, that I will inquire and find out. But, again, the way this was handled, certainly my knowledge goes back to Attorney General Smith, and the way this matter has been handled in terms of the Attorney General's involvement is no different from the way it was handled then. So I would not draw any conclusions on the basis of this now.

Senator SPECTER. OK. Fair enough. I appreciate your responses, and I know you have a complicated, difficult job to do. I compliment you on your professionalism. I think you are a good witness. You know the antitrust law—I think you know the antitrust law. You certainly know more than I do about the antitrust law. Maybe you do not know, but I do not know enough to know that you do not know. And I think that you do a good job.

Mr. **Rule**. Well, thank you, Senator. I appreciate that remark.

Senator **Specter**. And I know a little antitrust.

Mr. **Rule**. I know you do.

Senator **Specter**. Let me turn just very briefly to the question of the NFL because I think this is an important question, and I think we are going to be hearing a lot about this at a later time. Thank you for the response. It is a very long letter.

Let me say to you that on this six-page letter I would have been delighted to have it begin with the next to the last paragraph and end with that paragraph. That is the paragraph that I was concerned about, and that is the issue as to whether the arrangement with ESPN and the NFL was covered by the antitrust exemption or not. And you have said that it is not because it is, in part, pay and pay is not covered by the antitrust exemption.

Then you have said that you are not investigating it because it is in the hands of the FTC, and I would like to know what is the delineation. Does the FTC and Justice not ever investigate the same items?

Mr. **Rule**. We generally do not. We try to avoid any overlap. We have a clearance process that in the Antitrust Division is coordinated through our Office of Operations. If one agency wants to investigate a matter—that is, to go out and interview people and solicit information and that sort of thing—that agency requests that the other agency clear it to them.

Senator **Specter**. OK. So the answer is that the FTC is investigating the ESPN-NFL issue.

Mr. Oliver, we kept you here a long time, Mr. Chairman. What is happening on that to the extent you can tell this subcommittee? You are investigating whether or not the NFL taking over—whether the NFL deal with ESPN violates the antitrust laws. What, if anything, can you tell us about that investigation?

Mr. **Oliver**. I think we indicated in a letter to you, to this committee a while ago, that we are investigating a legal question of whether the NFL dealing with the cable networks has the same antitrust exemption that dealing with the other networks has. So what we are doing is a legal analysis.

Senator **Specter**. Well, that is the same analysis of Mr. Rule. You fellows do not overlap, I thought.

Mr. **Oliver**. We do not overlap on investigations, but we may overlap periodically, I guess, in legal analysis.

Mr. **Rule**. Let me just say this——

Senator **Specter**. Well, I am not so much concerned about the legal analysis. I have got a few lawyers that do that, too. The question I would like to have answered is: Does the NFL arrangement on pay TV violate the antitrust laws? And I have a concern that it does. Because in a nutshell the antitrust laws do not prohibit monopolies, but if there is monopoly power used in an improper way, it may violate the antitrust laws, would violate the antitrust laws.

And reducing output and increasing prices is an example of an abuse of monopoly parties.

Now, where we have NFL games moved to cable, where there is a price increase—because it goes from no price, from free TV to the cost of cable service—and there is a decrease in output—that is, fewer people watch ESPN on the Sunday night television and the Pro Bowl than watch it otherwise—isn't there an antitrust violation?

Mr. OLIVER. I think the question is whether there is an exemption, as I understand it. There is an exemption for dealing with the other networks, and that exemption may or may not cover their dealings with the cable networks.

Senator SPECTER. Mr. Rule has answered the question that there is no exemption, and he says FTC is now examining the substantive question as to whether there is a violation.

Mr. OLIVER. I think the FTC is still examining the legal question of whether or not the exemption covers that.

Senator SPECTER. How about it, Mr. Rule? I thought you said—your letter says they are examining the substantive questions of whether there is an antitrust violation.

Mr RULE. Let me just give a tiny bit of background. As you know, Senator, you requested in a report, I believe, that we look at—actually, I guess it was in part of the continuing resolution or an appropriations bill, as I recall. There was a provision that required the Department of Justice to provide a legal interpretation or a legal opinion as to whether or not the exemption applies to the ESPN contract.

Prior to that time, as I understand it, the FTC had requested clearance to look at this matter. Now, normally, we would have cleared to them a request for a legal interpretation as well since they were looking at this matter. But since it had come up in the context of a specific request to us to provide a legal interpretation, obviously we wanted to provide you that interpretation.

That is our view of the exemption, that the exemption does not apply to this contract, and that was the request that you made to us. But with respect to whether or not any aspect of this agreement, of this contract violated the antitrust laws, it was my understanding that we had cleared that investigation to the FTC. But, obviously, as a threshold matter, the FTC has to decide on its own whether it agrees with us that the exemption does or does not cover this contract.

I cannot bind them based on how I read that exemption.

Senator SPECTER. Well, if they believe there is an exemption and you do not, and they are not looking at the substantive issue, then under the criteria set forth in your letter you will investigate that, right?

Mr. RULE. Well, I——

Senator SPECTER. That is a leading question.

Mr. RULE. It is a leading question, and for that reason it is a difficult situation for me to answer.

I think what I need to do is go back and check my sources, as they say, and find out exactly where the state of play is, and then decide how we should proceed.

Senator SPECTER. Well, Mr. Rule, you say in your letter that the Antitrust Division's general standards for conducting a formal investigation require both the facts presented appear to support a legal theory of an antitrust violation and that the investigation not duplicate other efforts, including those of the FTC.

Well, at least at this point, that investigation would not duplicate those of the FTC. That leaves the issue as to whether the facts presented appear to support a legal theory of an antitrust violation. And I submit to you that there is at least that standard met on the analysis that I articulated, that there is an increase in price and there is a reduction in output.

I would like to get this matter investigated on the substance.

Mr. RULE. I understand what you are saying, Senator. We did not look at those other two questions because we felt the threshold question not to duplicate investigations was answered.

Now, if I was wrong in that judgment, if we have not cleared it through the FTC, then I will have to look at those other two questions. If I am right, then the FTC is looking at it. And as long as they are looking at it, it makes sense for them to continue to look at it and not for us to go back and duplicate it.

Senator SPECTER. Mr. Oliver, is he right on the narrow question that the FTC is looking at the substantive issue of antitrust law violation?

Mr. OLIVER. It is our practice, Senator, neither to confirm nor deny whether or not we have an investigation of any party pending. I can say that we are looking at the legal issue of whether or not there could be an antitrust violation.

Senator SPECTER. When will you have an answer on the legal issue?

Mr. OLIVER. I would think in several months.

Senator SPECTER. How long have you had the matter?

[Pause.]

Senator SPECTER. You know, I do not understand this at all. The Department of Justice can figure out a tough antitrust issue in the course of several days, less than 15 days, and have a consent decree. And Senator Metzenbaum and I write to you last fall and ask you for an answer on ESPN and the NFL, and we get back a long six-page letter which finally gets around to one paragraph and says: We have considered half the question whether there is an exemption, but we haven't considered the substantive matter. And now the FTC is here and says they haven's even answered the first question.

How long will it take from now to get an answer? Several months? Then I ask the question: When did you get the issue? And you do not even know the answer to that. Really, what is going on? How does this subcomittee get an answer to a question?

Mr. Oliver, when did you get our request to determine whether there is an antitrust violation on ESPN and the NFL?

Mr. OLIVER. I do not know the answer to that offhand, Senator. Is it in the letter? I do not remember.

Mr. RULE. Senator, all I can say, as I understand it, what we had been asked to look at was this exemption question. I will go back and check the facts about whether or not we had cleared an investigation of this contract to the FTC. If I am wrong about that, then we will reconsider those two threshold questions.

We were responding to a request from the Senate that we consider a matter that we would normally not have looked into if the FTC had looked at it. Obviously, the FTC has to consider both the facts and the law.

Now, I was under the impression that such an investigation was being carried out. If I am wrong, I am wrong.

Senator **Specter**. Mr. Rule, you were asked broader questions. I would request that both of you gentlemen provide the subcommittee with an answer by April 11, 12 days from now. As to you, Mr. Rule, when you will give us an answer to the substantive question—if you will give us an answer to the substantive question and when, as to whether the ESPN arrangement with the NFL violates the antitrust laws. And, Mr. Oliver, I would ask for a response in writing from the FTC—if I could have your attention, Mr. Oliver—when you got the request for this information as to whether there is an antitrust violation, and why you think today it is going to take several months, and whether you could not give us a response on the substantive matter—when you can give us a response.

But I would like to see this matter resolved by May 1, gentlemen. We have already finished one season; we are about to have another season; and I think the NFL is looking a lot more closely at the question of pay television. That is either the Department of Justice or the FTC.

Mr. **Oliver**. I would like to make at least one comment, if I may, Senator. The subject of this hearing was not that letter, and that strikes me as a good reason for my not knowing the dates that you are asking about. I was not called here to discuss that matter, and that is why I am not able to discuss it at great length today.

Senator **Specter**. Well, there is a practice, Mr. Oliver, that when we have these hearings the Senators bring up all the pending letters.

Mr. **Oliver**. I am not saying you cannot bring it up. I am only explaining why I do not have the answer, Senator.

Senator **Specter**. Well, the question is whether there is a reasonable expectation on your part that it is going to be brought up. There is no use belaboring the issue. I would just like to get answers to the questions by the 11th of April, and I would like to get the substantive answers, if we could, by May 1 so we know where we stand.

Mr. Oliver, I have not asked you the question about Beazer. I had written to you on March 28 as well. Is the FTC taking a look at compliance with Hart-Scott-Rodino on the Beazer-Koppers matter?

Mr. **Oliver**. As you may know, we have looked very carefully at Hart-Scott-Rodino procedures. We have recently asked the Justice Department to file four cases in connection with violations of Hart-Scott-Rodino procedures. So it is something we are well aware of and have been vigorous in making sure that those procedures are properly followed.

Senator **Specter**. Well, that is very interesting. Now, would you answer my question?

Mr. **Oliver**. It is our practice not to discuss non-public investigations in public hearings. So what I would like to say in public is that we neither confirm nor deny whether we are making an investigation of the particular matter you raise. I have tried to give you an indication that we take these matters seriously and have the track record to prove it.

Senator **Specter**. You are saying to me that you consider it inappropriate in a Senate Judiciary Subcommittee hearing to answer questions as to whether the FTC is considering whether Hart-Scott-Rodino has been complied with on a specific pending matter?

Mr. **Oliver**. It is our practice in public sessions not to confirm or deny whether we are making an investigation of a particular party; that is correct.

Senator **Specter**. Why is that?

Mr. **Oliver**. Well, because of the effect it would have on the party being investigated. If we announce that we are investigating somebody for violating the law, it is likely to damage that person's reputation. And if we discover subsequently that there is no problem, how do they get their reputations back? That is our practice.

Senator **Specter**. Mr. Oliver, there is not a question as to whether you are investigating a law violation; there is a question here which is quite different as to whether there has been compliance with certain statutory requirements of disclosure, an analysis as to whether there is an antitrust violation. I am not asking if you are investigating somebody.

Mr. **Oliver**. I thought you were asking me if we were investigating whether they properly complied with the Hart-Scott-Rodino filing procedures.

Senator **Specter**. Yes, that is what I am asking you.

Mr. **Oliver**. Well, if they did not properly comply with them, wouldn't that be a violation of law?

I am missing something, Senator. If they are not properly complying with those laws, that is a violation of the law, and if we are investigating them, then we are investigating a violation of law.

Senator **Specter**. I would submit that it is fundamentally different to make an inquiry of an agency as to whether you are conducting a criminal investigation or some inquiry which bears on the integrity of any party. That is a private matter until the investigation is completed. But it is something quite different where Congress has set out a specific statutory procedure for complying with Hart-Scott-Rodino.

We have had a very extensive discussion with Mr. Rule here today on this subject. This is not a matter where they may—does something amuse you here?

Mr. **Oliver**. No.

Senator **Specter**. This is not a matter where they may or may not be subject to questioning. This is an absolute requirement that they be subjected to scrutiny for compliance with the statutory requirements of Hart-Scott-Rodino.

Mr. **Oliver**. Well, I can only repeat my previous answer, which is we do not—and it is the FTC's practice and has been for a long time, as I understand it, not to reveal whether we are conducting an investigation against a specific party. I can tell you that in the course of our business, as our track record shows in the last few weeks, we do concern ourselves with whether the Hart-Scott-Rodino procedures are complied with.

Senator SPECTER. Well, you say you cannot disclose it publicly. Are you suggesting you can disclose it privately to me?

Mr. OLIVER. That is our practice, with Commission approval, yes, sir.

Senator SPECTER. Is there any rule in effect between Justice and FTC that when one reviews a matter like Hart-Scott-Rodino the other does not?

Mr. RULE. The way that works as well, the investigations are cleared to one agency or another. Under the statute, we are the only ones that can bring an enforcement action. So even if the Commission investigates a matter and decides to vote out some sort of action, they have to refer it to us for filing. And so, to some extent, we review it, although we are just, in effect, in that case the FTC's lawyer. But with respect to the substantive investigation, that is cleared to one agency or the other through the same clearance process.

Senator SPECTER. So only one agency conducts that inquiry?

Mr. RULE. Right.

Senator SPECTER. Is that your understanding, Mr. Oliver?

Mr. OLIVER. That is my understanding. Otherwise, we get duplication. That would seem to be wasting resources, I think.

Senator SPECTER. Well, I am just trying to find out.

Mr. Rule, when you enter into a consent decree, haven't you made a determination that there has been compliance by Beazer with Hart-Scott-Rodino?

Mr. RULE. Well, let me just say the way Hart-Scott-Rodino works is it requires parties to file notification with us prior to making an acquisition. For example, in the Beazer case, there has been no acquisition, to my knowledge, that exceeds the thresholds under the Hart-Scott-Rodino Act. So they would not technically be violating Hart-Scott-Rodino even if they did not file anything until they actually acquired something above the $15 million threshold.

Technically, even before a Hart-Scott-Rodino filing was made, we could learn of, and we often do learn of, a potential merger in the making. We may have even being investigating it before the Hart-Scott-Rodino letter comes in, and we might even reach a conclusion and even enter into a consent decree, conceivably prior to the filing under the Hart-Scott-Rodino law.

Now, the Hart-Scott-Rodino Act would still have to be complied with; in other words, they could not ultimately acquire something until they had made that filing, although we can grant it early termination. But the thing that puts them in violation is the actual acquisition.

Senator SPECTER. So your answer is yes? Your answer is that you do not necessarily determine compliance with Hart-Scott-Rodino when you enter into a consent decree?

Mr. RULE. The answer is yes, I suppose. Yes.

Senator SPECTER. OK. Thank you all very much. That concludes the hearing.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned.]

[Aforementioned letters follow:]

United States Senate

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WASHINGTON, DC 20510-6275

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November 20, 1987

The Honorable Charles F. Rule
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Rule:

We are writing to request that the Antitrust Division of the Department of Justice study and report to the Antitrust Subcommittee of the Senate Judiciary Committee on the National Football League's telecasting practices.

As you may know, on September 29, 1987, Senator Specter introduced S. Res. 291 calling for the Antitrust Division to study and report to Congress on issues relating to the NFL's telecasting practices. Specifically, the resolution called for a study of (1) the implications of new technology, specifically cable television and pay-per-view television services, on the application of existing antitrust laws to the telecasting practices of the NFL, and (2) the effect on the antitrust status of current NFL telecasting practices of the merger of the League's cable television partner with one of the major broadcast networks.

The Antitrust Subcommittee held a hearing on S. Res. 291 on October 6, 1987. We believe that this hearing clearly demonstrated the need for additional study and that the Antitrust Division has the appropriate expertise and experience to undertake such a study.

Accordingly, we request that the Antitrust Division undertake the study called for by S. Res. 291 and report its conclusions to the Antitrust Subcommittee within 120 days. The report should include a statement of the Division's antitrust enforcement plans with respect to the NFL's telecasting practices.

If you have questions regarding this request, please contact Mary Louise Westmoreland (224-5701) or Jeffrey Robinson (224-6791) of the Judiciary Committee staff. Thank you very much for your cooperation in this matter.

Sincerely,

Arlen Specter
Arlen Specter
United States Senator

Howard M. Metzenbaum
United States Senator

U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

MAR 30 1988

Honorable Arlen Specter
Member
Subcommittee on Antitrust, Monopolies
and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

This letter responds to your November 20, 1987, letter requesting the Antitrust Division to study and report to the Subcommittee on the telecasting practices of the National Football League (NFL). Both your letter and the Subcommittee's October 6, 1987, hearing indicate particular interest with regard to the NFL's agreement with the Entertainment and Sports Programming Network (ESPN), a cable televison service, for ESPN to carry a number of NFL games on Sunday nights. More generally, you are interested in the question whether the antitrust exemption contained in the Sports Broadcasting Act covers agreements between sports leagues and those entities such as ESPN that carry league games via cable or some other means different from traditional over-the-air, "free" TV. Your inquiry raises a basic issue of how best to apply a statutory antitrust exemption in the context of an evolving industry.

Background

The NFL-ESPN contract covers the 1987-1989 seasons and provides that each season ESPN will carry 1 regular season game on each of 8 Sunday nights, 4 preseason games, and the Pro Bowl (the league's all-star game). The contract requires every game carried by ESPN to be simultaneously offered for telecast to a broadcast TV station in the home city of the visiting team, and, if the game is sold out in advance, in the city of the home team. All other NFL regular season games remain with the three major television networks. All Sunday afternoon games continue to be televised by CBS and NBC--most regionally and some nationally--and the one Monday night game per week continues to be televised nationally by ABC. Post-season playoff games, including the Super Bowl, also remain on network TV.

It is our understanding that ESPN is provided to viewers by participating cable television systems as part of "basic cable," for which cable subscribers pay a monthly fee. ESPN, which is currently provided to approximately 44 million households in the United States, receives a portion of its revenues from advertising and a portion from fees paid by cable systems.

The Sports Broadcasting Act ("the Act"), 15 U.S.C. §§ 1291-95, exempts from the antitrust laws joint agreements among professional sports teams within a league (football, baseball, basketball, hockey) selling the rights for "sponsored telecasting" of games. 1/ The Act was enacted in response to a 1961 judgment that prohibited the NFL from granting telecasting rights to CBS on behalf of all teams. *See United States* v. *National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). 2/ The purpose of the Act was to enable the member clubs of a professional sports league "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws." H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2 (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. 1 (1961).

1/ The exemption has two principal limitations. First, it does not cover agreements that restrict the area into which a game may be telecast except to protect a team playing at home. 15 U.S.C. § 1292. Second, the exemption does not cover agreements that permit professional football telecasts on Friday nights or Saturday afternoons during the high school and college football seasons. 15 U.S.C. § 1293.

2/ The court found that the CBS/NFL contract in question violated a 1953 judgment that prohibited the NFL and its teams from entering into any agreement "having the purpose or effect of restricting the areas within which broadcasts or telecasts of games . . . may be made." The 1953 judgment had been entered after the court found that an agreement among league members restricting the televising of games into an NFL city on a day when the team located in that city was playing on the road constitued a violation of Section 1 of the Sherman Act. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

The legislative history of the Sports Broadcasting Act reveals that Congress was concerned that a sports league--and in particular, the NFL, which was the only league subject to the 1961 judgment--be able to assure an adequate amount of television coverage and income to its member teams that had limited local television markets, on a basis of substantial equality with the stronger clubs. Otherwise it was feared that the financial weakness of some teams in a league could imperil the league's continued operation. H.R. Rep. No. 1178, 87th Cong., supra, at 2-3; S. Rep. No. 1087, 87th Cong., supra, at 1-3. Congress concluded that "the public interest in viewing professional league sports warrants some accommodation of antitrust principles . . . ." H.R. Rep. No. 1178, supra, at 3; S. Rep. No. 1087, supra, at 3.

Analysis

The question that arises under the Sports Broadcasting Act with regard to the NFL-ESPN agreement (and other agreements between a sports league and someone presenting games to television viewers by means other than traditional over-the-air "free" television) is whether the agreement is for "sponsored telecasting" within the meaning of 15 U.S.C. § 1291. If what is involved is not "sponsored telecasting," the Act's antitrust exemption does not apply. Failure to come within the meaning of "sponsored telecasting" does not make an agreement illegal--it merely means that the agreement is subject to the antitrust laws, as is most commercial conduct.

In construing the term "sponsored telecasting," which is not defined in the Act, we begin by recognizing the settled rule that exemptions to the antitrust laws are to be construed narrowly. 3/ The Supreme Court has, in construing a variety of statutory antitrust exemptions, recognized and applied the rule of construing such exemptions narrowly. See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (McCarran-Ferguson Act); Abbott Laboratories v. Portland Retail Druggists Assn., Inc., 425 U.S. 1, 11-14 (1976) (Nonprofit Institutions Act); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973) (§ 15 of the Shipping Act); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956) (Miller-Tydings Act and McGuire Act).

3/ See, e.g., Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed . . . . This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.").

Our analysis is also aided by in general the legislative history of the Act and in particular two statements that, while not going into detail on the meaning of "sponsored telecasting," do give some indication as to what Congress intended. First, the House Report, noting that the exemption applies to the sale of rights in the sponsored telecasting of games, states: "The bill does not apply to closed circuit or subscription television." H.R. Rep. No. 1178, supra, at 5. Second, in an exchange between NFL Commissioner Rozelle and the chief counsel to the Antitrust Subcommitee of the House Judiciary Committee, Commissioner Rozelle was asked: "You understand, do you not, Mr. Rozelle, that this bill covers only the free telecasting of professional sports contests, and does not cover pay TV?" Commissioner Rozelle responded: "Absolutely." Telecasting of Professional Sports Contests: Hearing Before the Antitrust Subcomm. of the House Judiciary Comm., 87th Cong., 1st Sess. 36 (1961). Our reading of these two statements in the legislative history is that Congress was, by using the term "sponsored telecasting," trying to distinguish between advertiser-supported programming (such as traditional over-the-air TV) that is in a sense "free" to viewers and viewer-supported programming (such as the closed circuit and subscription television that existed in 1961 and is referenced in the House Report).

ESPN does not fit neatly into this dichotomy. It is something of a hybrid, deriving a portion of its revenue from the sale of advertising and a portion from cable systems that resell it and thus indirectly from the monthly basic cable fee paid by cable subscribers. 4/

Congress in 1961 could not of course have foreseen the changes that have occurred in technology and in the marketplace for delivering television programming. ESPN (as well as other cable program services) and other options available today for receiving programming were not then in existence. In view of the evolution of the industry, it is thus not surprising that the term "sponsored telecasting," even if clear in 1961, has some ambiguity as applied today.

While we believe there is some question as to whether programming such as ESPN's NFL games that is partly supported by advertisers and partly by viewers is "sponsored

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4/ While cable viewers do not pay a separate charge to receive ESPN, they cannot receive ESPN via cable without paying the cable operator's monthly fee for basic service.

telecasting," 5/ our view is that it is not and thus does not come within the Act's exemption. This conclusion is consistent with Commissioner Rozelle's agreement with Subcommittee counsel in 1961 (quoted above) that the legislation covers "only the free telecasting" of games.

Our conclusion is also consistent with the settled rule that antitrust exemptions are to be construed narrowly. Where the evolution of an industry has rendered the wording of a statutory antitrust exemption ambiguous as applied to new situations, there are basically two approaches toward construing the exemption. First, the exemption can be construed narrowly, as covering only those situations that Congress clearly had in mind when it created the exemption. Second, the exemption can be construed more broadly by attempting to determine whether the Congress that created the exemption would have exempted the conduct in question had it been able to foresee the industry's evolution and thus consider that conduct. We believe that the narrow construction is both required by the Supreme Court cases cited above and preferable on policy grounds. Where Congress, through a statutory antitrust exemption, has created an exemption to that policy for certain practices of an industry, Congress can, if it sees fit to do so, update or expand the exemption that it created in order to meet new and unforeseen situations.

We emphasize again that a conclusion that certain conduct (such as the NFL-ESPN agreement) is not exempt from the antitrust laws does not make such conduct presumptively unlawful and means only that such conduct is subject to those laws. While we have concluded that the NFL-ESPN agreement is not exempt under the Sports Broadcasting Act, we have not found cause to investigate that agreement under the antitrust laws. The Antitrust Divison's general standards for conducting a formal investigation require both that the facts presented appear to support a legal theory of an antitrust violation and that the investigation not duplicate other efforts, including those of the Federal Trade Commission. It is our understanding that the Federal Trade Commission has an investigation underway that is looking at the facts and circumstances surrounding the NFL-ESPN agreement. Based upon our review, we do not believe the facts warrant inquiry into competitive issues beyond those under consideration by the FTC.

5/ The question arises of how much advertiser support (or how little viewer support) is enough to satisfy the exemption. There seems to be no definitive answer.

I hope that this letter is responsive to your inquiry. Your interest in this matter and in the enforcement of the antitrust laws is greatly appreciated.

Sincerely,

Charles F. Rule
Assistant Attorney General

APPENDIX

STATEMENT OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION ON S. 1407 AND S. 635

The American Corporate Counsel Association ("ACCA") is a professional association of attorneys practicing law as members of corporate legal departments. Founded in 1982, ACCA has approximately 7,200 members representing some 3,000 corporations in the United States. ACCA's members are regularly involved in such matters as board of director selection, merger enforcement policy, litigation and dispute management, and other corporate law issues. They have first hand experience in how various antitrust laws affect corporate operations.

ACCA's interest in S. 1407 and S. 635 arises primarily from its general concern with preventing unnecessary and costly litigation. In addition, ACCA is interested in efforts to increase the efficiency of the judicial system by discouraging frivolous claims and dilatory litigation tactics. Because of these interests, ACCA is supportive of those legislative proposals in the antitrust area that can remove impediments to procompetitive activity and reduce the threat of unwarranted antitrust suits.

ACCA believes these interests will be served by passage of the proposed "Antitrust Amendments Act of 1987" as set forth in title 2 of S. 635. Conversely, ACCA opposes S. 1407 which would needlessly increase litigation and stifle procompetitive activity.

Each of the five provisions which are the subject of these hearings are important to both the business and legal community. These provisions are: the Tunney Act amendments; standing under section 7 of the Clayton Act; claims reduction; detrebling of antitrust damages; and treble damage recovery for the United States. ACCA appreciates this opportunity to express its views.

Tunney Act Amendments

Section 6 of S. 1407 would expand the Tunney Act (15 U.S.C. sec. 16) to make its procedures applicable to dismissals of government initiated antitrust actions and consent decree modifications. The Tunney Act presently requires court review and approval, public notice, and a period of comment prior to the entry of an antitrust consent decree. The stated purpose of the Act is to help ensure that settlements agreed to by the government are in the public interest.

ACCA believes that expanding these procedural requirements to cover dismissals of government antitrust actions would not serve the public interest and would constitute an improper intrusion upon prosecutorial discretion. The ability to decide whether an action should be brought or maintained is the crux of a prosecutor's authority. These judgments are not ones that should be decided by judicial fiat or in response to public pressure.

The primary harm of this provision is that it involves judges in the executive branch decision of whether an action should be maintained and thus removes judges from their proper position as neutral magistrates. If enacted, this section would require judges to examine the prosecution's case for the purpose of determining whether continued prosecution was warranted. How is the court then to reassume its position as a fair and impartial forum for adjudicating the dispute? The notion that both prosecutors and judges must be involved in the investigation and prosecution of a case is foreign to our legal system and threatens the separation of powers and balancing of executive and judicial roles so carefully built into our Constitution.

The decision to dismiss an action usually will be based on facts which come to light only after a suit has been commenced. These facts may involve confidential information prepared or provided by the corporation's counsel in an effort to show that no violation had occurred or would occur. Maintaining the confidentiality of this critical and relevant information would be difficult under a law that opens the dismissal process to public debate. Alternatively, public debate or comment would be meaningless if the relevant facts were not disclosed.

Lastly, any decision by the federal government, even if misguided, hardly leaves the defendant free to violate the nation's antitrust laws. Injured private plaintiffs can still bring suit, as can state attorneys general acting as parens patriae.

ACCA also opposes expanding the Tunney Act to reach non-substantive modifications of antitrust consent decrees.
Over the past 50 years thousands of consent decrees have been entered into by the Department of Justice and the Federal Trade Commission. To require the court approval and public comment procedures of the Tunney Act every time one of these decrees is modified would create burdensome administrative work and consume valuable court time with cases of little public importance.

Moreover, faced with a full Tunney Act procedure, with all of its delays and uncertainties, defendant corporations may opt for retaining the status quo, thus frustrating what may well be valid, procompetitive objectives. This would be regrettable since changing circumstances do necessitate flexibility in modifying consent decrees. Corporations can be put at a competitive disadvantage when restricted by outmoded consent order provisions. Corporate counsel are put in the anomalous position of advising their management against undertaking otherwise legitimate conduct in order to comply with a past consent decree restriction, the factual underpinning of which has since disappeared. The assessment of a request for modification, particularly one involving technical matters, can best be made by the appropriate enforcement agency having the expertise. Delaying this process by requiring that Tunney Act procedures be followed is more likely to result in competitive injury than to shed new light on the validity of any particular modification.

As with dismissals, the modification might be necessitated by new circumstances which are documented in confidential materials. Public debate therefore would either be injurious to the company if the material is disclosed, or irrelevant if it is not.

Further, the positions of the parties when seeking a modification is fundamentally different from that attending the entry of an original consent agreement. The burden of proof is on the company seeking modification, and all restrictions remain in place unless the government takes action. Thus the bargaining power is on the government's side, and the public has less need to be concerned that the government will accept a poor agreement.

Finally, as the AT&T settlement indicates, where there exists sufficient public interest the Justice Department is perfectly free to voluntarily follow Tunney like procedures. There is no demonstrated need to impose these procedures every time a modification is sought.

In sum, the result of the proposed Tunney Act amendments will be to increase antitrust litigation expenses, delay competitive conduct, and intrude upon the legitimate function of the antitrust enforcement agencies without providing any overriding public benefit.

Standing Under Section 7 of the Clayton Act

Section 7 of S. 1407 would overturn the Supreme Court's ruling in Cargill, Inc. v. Monfort of Colorado, Inc., 107 S.Ct. 484 (1986). In that case the Court held that private injunctive actions under the Clayton Act 7 can only be brought by persons facing injury of the type intended to be protected by the antitrust laws. The Court in denying standing to Monfort correctly noted that the "antitrust laws...were enacted for 'the protection of competition, not competitors'...." (quoting Brown Shoe Corp. v. United States, 370 U.S. 294, 320 (1962)).

Ever since the Court's decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), it has been clear that before a person can have standing to sue for damages they "must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful," (429 U.S. at 489). The Court in Cargill merely extends this principle to injunctive actions by private parties.

While it is true that the enforcement of antitrust laws have traditionally depended in part upon the efforts of private plaintiffs, nowhere in the antitrust laws is it contemplated that these private plaintiffs need not demonstrate a direct antitrust injury to themselves.

Section 7 of S. 1407 would produce results contrary to the ultimate purpose of the antitrust laws-- to assure a fair and competitive marketplace. Providing standing to challenge a merger simply on the basis that one is in the same line of commerce simply would invite competitors to challenge mergers regardless of merit. Perversely those mergers creating the most efficiencies and greatest consumer benefit would become the prime targets for such suits. The corporate community simply does not need this impetus to further intercompany litigation, and neither does the public.

Claims Reduction

Currently, the treble damages attributable to a whole industry can be laid upon a single antitrust defendant. When all of the main companies in an industry are included in the suit and decide to litigate the claim together, this rule of joint liability does not ordinarily create an unjust result. A sharing agreement will generally be used to reasonably allocate damages. However, when individual defendants settle during the course of a case, those remaining as defendants face a high degree of pressure to settle the case so as to avoid excess exposure to damages. This pressure results from the fact that only the settlement amounts, not the total damages attributable to the settling defendant, are "carved out" of an overall damage recovery.

Section 203 of S. 635 provides for a more adequate and equitable set-off provision. Under this provision, the treble damages attributable to settling defendants would be deducted from the total recoverable from the remaining defendants. The damages caused by other guilty parties who were not brought into the suit would be deducted as well.

Ever since the Supreme Court ruled in 1981 that defendants in antitrust cases could not enforce rights of contribution (Texas Industries, Inc. v. Radcliffe Materials, Inc., 451 U.S. 630) Congress has been studying possible legislative remedies. After examining three possible approaches: contribution, claim reduction, and the elimination of joint and several treble-damage liability, the Senate Judiciary Committee in the last Congress overwhelmingly approved an identical measure (S. 1300) to the one proposed here in S. 635. We supported the bill then, and we do so again today.

This change will allow companies that wish to litigate to do so without concern that failure to settle will force them to bear excessive liability flowing from the acts of other companies. Joint and several liability would still apply to companies that remain parties to the suit, although the legislation, following current practices, would direct courts to allocate by market share the damages caused by overcharges or underpayments in price fixing cases. (With respect to other types of claims, damages are to be allocated on the general basis of culpability.)

Criticism of the measure as a "share of the loot" defense is misplaced. The proposal specifically preserves joint and several liability in antitrust cases. The only difference is that plaintiffs would have less incentive to offer or accept "sweetheart" deals and would be unable to "whipsaw" innocent defendants. While it is true that all settlements have an element of coercion in that one side or the other may wish to avoid litigation, it is not generally true that those who refuse to settle will be left paying for the actions of others. Most civil actions do allow for the right of contribution, and even in criminal cases defendants are not subjected to the cumulative sentences of their co-conspirators who may have plea bargined.

In sum, passage of this provision will assure fairness in the allocation and award of antitrust damages. In doing so, it will better enable innocent firms to litigate their liability and end plaintiff "whipsaw" tactics forcing them to submit to unfair settlements.

Detrebling of Damages

ACCA supports section 212 of S. 635 which would effectively eliminate treble damage remedies except for suits involving horizontal price fixing and other conduct resulting in overcharges or underpayments. Such punitive damages should be imposed only in those situations where no procompetitive justification for the action can be found. Currently the spectre of treble damages reduces the ability of businesses to react flexibly to ever-changing market demands and can be used by competitors as a means to attack tough competition.

It is widely recognized that treble damages can provide private parties with a strong financial incentive to enforce the antitrust laws. Since public enforcement is somewhat selective and likely to concentrate on more flagrant violations, private enforcement can effectively complement those efforts to discourage illegal conduct. However, as the Department of Justice has noted, the treble damage remedy has had an untoward effect on legitimate competition to the point that one can legitimately question whether treble damages overdeter potentially procompetitive practices.

The reality of private suits is that more than half of them are brought by competitors, terminated dealers, suppliers, and former employees--not by consumers. We believe that when the benefits of having an aggressive private enforcement policy are weighed against the detriments, reason dictates an approach which continues to strongly deter, through the use of the treble damage remedy, unquestionably detrimental anticompetitive conduct resulting in overcharges and underpayments, while, through the application of actual damages, avoiding overdeterrence of conduct that may actually benefit consumers and the economy.

In addition, although we assume that this provision would also detreble damages arising out of the Robinson-Patman Act, the matter is not entirely clear. We recommend that the provisions applicability to Robinson-Patman be explicitly mentioned in the legislative history.

Any legislative history should also make clear that recovery of plaintiff's attorney fees includes costs attributable to plaintiff's in-house counsel as well.

Opponents of detrebling contend that it would lead to more antitrust violations and less private enforcement. This outcome is unlikely, particularly with respect to cases involving monopolization or dealer termination. Both of these types of violations tend to threaten the ability of potential plaintiffs to remain in business. The incentive to bring an action in these situations is thus very strong and not dependent upon the recovery of treble damages. The same is true in regard to claims of retail price maintenance. Discounters are not likely to sit passively and watch their market share disappear when confronted with efforts of manufacturers to set prices.

Treble damages are meant to induce private enforcement and deter illegal behavior. To the extent that procompetitive activity is deterred, consumers, the ultimate intended beneficiaries of our antitrust laws, suffer injury. Redrawing the lines for the imposition of treble damages as set forth in S. 63 would we believe, on balance, strengthen competition and benefit the public.

Treble Damages for the United States

Provisions appear in both S. 1407 and S. 635 permitting the United States to obtain treble damages under certain circumstances. While the provision in S. 635 is preferable to that in S. 1407, since the former limits the situations under which any treble damages would be imposed as part as the section on detrebling, ACCA does not believe the federal government needs this added weaponry in its arsenal. The purpose of treble damages is to deter violations and encourage private enforcement. Any decision to engage in illegal anticompetitive conduct against the federal government is unlikely to rest upon whether actual or treble damages can be recovered. Nor should federal enforcement of our antitrust laws be driven by possible financial recovery. The U.S. Department of Justice and the FTC have the duty to enforce the antitrust laws irrespective of any monetary incentives.

Conclusion

The American Corporate Counsel Association is concerned that S. 1407 would result in increased antitrust litigation, significantly increase the costs of resolving antitrust suits, and stifle competition. In contrast, S. 635 would helpfully reform our antitrust laws and reduce the misuse of litigation for anticompetitive purposes. To the extent that unmeritorious suits are discouraged by the antitrust laws and that disputes can be resolved quickly and fairly among the parties without burdensome procedural requirements, the public and our corporate clients will be the winners.

Thank you for allowing ACCA to present its views to this Committee on this important legislation.

MANUFACTURING
CREATES
AMERICA'S
STRENGTH

STATEMENT OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
ON ANTITRUST REMEDIES PROPOSALS

TO THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 18, 1988

NAM

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The National Association of Manufacturers is a voluntary business association of more than 13,500 corporations, large and small, located in every state. Members range in size from the very large to the more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

EXECUTIVE SUMMARY

The NAM opposes proposals to grant treble damages to the United States, absent a showing of need. In addition, there is great danger to the free market system in allowing a company to enjoin a proposed merger solely because the firm is engaged in the same line of commerce as the merger in question.

It is time, however, for Congress to begin to question the award of treble damages for non-price related antitrust violations.

Finally, the NAM takes no position on extending Tunney Act provisions to modify or dismiss consent decrees.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

ON PROPOSED ANTITRUST REMEDIES

TO THE SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

APRIL 18, 1988

The National Association of Manufacturers appreciates the opportunity to make this statement for the record relating to the March 31 hearing on the proposals affecting treble damage awards for antitrust suits, to amend the Tunney Act, and to revise the Supreme Court decision of Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. ____, 107 S. Ct. 484 (1986) contained in S. 1407, the Antitrust Remedies Improvement Act of 1987, and Title II of S. 635, the Antitrust Amendments Act of 1987. In this statement, we will refer to the issues separately. We would like to thank the committee for conducting this hearing on an issues-specific basis rather than on either S. 1407 or S. 635 as packages.

Treble Damages for the United States

The NAM opposes the awarding of treble damages to the United States in antitrust suits. Section 3 of S. 1407 proposes to amend the Clayton Act so that the United States may recover treble damages for any suit it initiates; those damages have traditionally been limited to actual damages. Section 213 of Title II of S. 635 would maintain the present actual damage award, but would grant treble damages to the United States for cases involving overcharges or underpayments.

The initial reason for granting treble damages for successful private antitrust plaintiffs was to provide incentive to bring suit, given the potential length and high cost of litigation. The United States does not lack for incentives or resources, nor is there a potential for the United States to suffer the loss of business during the litigation; therefore, these justifications should not be extended to cases brought by the United States.

Perhaps the strongest argument in favor of this proposal is that the threat of treble damages has a deterrent effect on illegal activity. In cases where the United States is the damaged party, however, the Department of Justice and individual department and agency inspectors general already possess a large arsenal of potential weapons in combatting alleged fraudulent activity, most notably the False Claims Act of 1863 and the Program Fraud Civil Remedies Act of 1986. The former was strengthened and the latter was enacted during the 99th Congress; together, they provide powerful new tools for the United States in restraining illicit behavior -- including the awarding of double damages.

Since these new laws have only recently been implemented, the Committee should allow them time to work before granting U.S. attorneys and inspectors general the additional threat of a treble damages antitrust trial when attempting to exact a settlement on charges of fraud.

Another argument in favor of treble damages for the United States is that government suits should be on a par with private enforcement. The preferred solution is, however, to detreble private claims.

Detrebling of Private Claims

While there is no corresponding provision in S. 1407, Section 212 of Title II of S. 635 would provide for actual in lieu of treble damages for a successful private antitrust suit except in cases involving price-fixing. The NAM supports this concept.

Recent scholarly research has questioned the continued need for treble damages. As noted above, the original reason for granting treble damages to private plaintiffs was to provide additional incentive to sue in order to prevent monopolistic behavior from injuring the consumer. In practice, however, many antitrust lawsuits are brought to protect a firm from dynamic competition and may actually hurt consumers if successful.

With U.S. manufacturers facing a highly competitive international marketplace, the thrust should be to remove disincentives to vigorous and innovative marketing practices. The threat of treble damages could be used as a brake on at least some legitimate competitive practices.

Within the last five years, damages were detrebled for joint ventures in the research and development area and the effect has been positive. In addition, the Judiciary Committee currently is considering legislation to detreble damages for cases involving intellectual property in order to promote domestic competitiveness. It is important to note that the most pernicious antitrust violations affecting competition and the consumer are those dealing with price fixing. Victims of this practice, however, would still be entitled to treble damage awards under the terms of S. 635.

The remedy of payment of trial costs and reasonable attorneys' fees provided in S. 635 also should be sufficient to guarantee that worthy suits are still brought. And, as a balance, the corresponding award of trial costs to prevailing defendants should help to ensure that the number of frivolous suits is diminished.

Consent Decrees

Section 6 of S. 1407 would extend the provisions of the Tunney Act to modifications or dismissals of consent decrees. The NAM has not taken a formal position on this proposal.

Standing

The NAM opposes Section 7 of S. 1407, which would modify the Supreme Court decision in Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. ____, 107 S. Ct. 484 (1986).

Standing is certainly critical to the successful enforcement of the antitrust laws. The Monfort case makes clear, however, that competitors often sue for self-serving reasons that go against the public interest. In that case, a meatpacker sought to enjoin the merger of two competitors that would have provided a significant increase in competition. Neither the plaintiff nor the defendants combined commanded the number one position in terms of market share.

The analysis of the Monfort decision by U.S. District Judge Eldon Mahon in the case of Phototron Corporation v. Eastman Kodak Company, No. CA 4-87-910-E (N.D. Texas, Feb. 22, 1988), reprinted in 54 Antitrust and Trade Regulation Report (BNA) 374 (Mar. 3, 1988), points out that the Supreme Court did not bar competitors from enjoining proposed mergers. Rather, the Court argued that Monfort's lack of standing stemmed from the fact that sufficient grounds for antitrust violations did not exist and that "Monfort's injury resulted only from increased competition, not anticompetitive tactics on the part of the defendant."

Regrettably, should the provision affecting standing contained in S. 1407 become law, then many mergers and acquisitions that have the effect of increasing efficiency, and thereby competition, may be nullified before they are consummated. This is clearly contrary to the intentions of the antitrust laws. The fundamental purpose of these laws is to foster competition, and not to allow competitors to protect their market share.

The NAM hopes that these comments have been helpful. We look forward to working with you as the proposals progress.

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